

A hearing convened on August 12, 2004, before ALJ James W. Norman at the State Office of Administrative Hearings, Austin, Texas. ___ appeared and was represented by its counsel, Jeremy A. Lunn. Dr. Vo appeared and was represented by his counsel, Chadrick Henderson. There were no objections to notice or jurisdiction. The hearing closed on August 12, 2004.

1. Jurisdictional Motion

___ asserted that TEX. LAB. CODE ANN. (Labor Code) ' 413.014(d) and 28 TEX. ADMIN. CODE (TAC) ' 133.308(f)(7), read together, require dismissal of this case because the IRO decision was rendered during the pendency of an extent-of-injury dispute before the Commission.

The ALJ is not persuaded by this argument. Section 413.014(d) of the Labor Code provides that an insurance carrier is not liable for services requiring preauthorization unless preauthorization is sought by a claimant or provider and either obtained from the insurer or ordered by the Commission. This provision does not relieve ___ of liability because the IRO authorized the services on behalf of the Commission Medical Review Division.

Rule 133.308(f)(7) says if the insurance carrier has raised an extent-of-injury-liability dispute, the request for an IRO will be held in abeyance until those disputes have been resolved by a final decision of the commission.³ Case law says when a statute is silent about the consequences of noncompliance, a court will look to its purposes to determine a proper construction⁴in this case whether noncompliance with the rule should result in a forfeiture of Dr. Vo's claim for payment. The obvious intent of the law is to avoid unnecessary effort and expense if the injury is ultimately found

³ It is undisputed that neither ___ nor Dr. Vo gave notice to the IRO of the extent-of-injury dispute before it rendered its opinion; the Commission had not rendered its opinion at the time ___ filed its appeal with SOAH; and the Commission hearing officer and Appeals Panel have now rendered a decision concluding that the Claimant had chronic pain syndrome (and that the compensable injury did not include anxiety or depression). Dr. Vo testified he was not aware of the extent-of-injury dispute at the time the IRO decision was pending.

⁴ *Helena Chemical Co. v. Wilkins*, 47 S.W. 2d 486 (Tex. 2001); *Albertson' s Inc. v. Sinclair*, 984 S.W. 2d 958 (Tex. 1999).

not to be compensable. The ALJ concludes that the purpose behind the rule does not require dismissal for failure to abate because a party such as ____ has ample opportunity to inform an IRO of a compensability dispute, and thus avoid any unnecessary expense. Moreover, the *Sinclair* court held that the workers' compensation statute should be liberally construed to carry out its evident purpose of compensating injured workers and their dependents.

2. Factual and Legal Background to CPMP Request

The Claimant sustained a bilateral shin trauma and right-rotator-cuff-work-related injury/tear on _____. He underwent right-shoulder-rotator-cuff-partial-tear repair in June 2001 and secondary surgery in December 2001. He has continued to have bilateral shin/knee pain even though he has undergone multiple physical therapy sessions, work conditioning and work hardening, and pain management. A designated doctor found him to have reached maximum medical improvement on June 17, 2002, with a 10-percent-whole-person-impairment rating.

The IRO physician reviewer was board certified in physical medicine and rehabilitation. He said:

This patient clearly has developed chronic pain syndrome. In other words, a constellation of biological as well as psychological changes that are maladaptive; he has dysfunction, disuse, depressed mood and disability as described by Brena. In 19- - [last two digits unreadable], J. C. King et al. described interdisciplinary behavior modification approach. This is a concept adopted at several programs throughout the USA, including the Mayo Clinic in Rochester, Minnesota.⁵

The Claimant underwent twenty sessions of CPMP from September 30, 2003, until November 12, 2003, based on the IRO decision.

Employees have a right to necessary health treatment under ' ' 408.021 and 401.011 of the Labor Code. Section 408.021(a) provides An employee who sustains a compensable injury is

⁵ Ex. 2 at 18.

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: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment.@ Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

3. Evidence and Analysis

The ALJ concludes that ____ failed to prove the CPMP was medically unnecessary. The preponderant evidence supports the IRO physician's decision.

____ had a very difficult burden in this case because of three undisputed or uncontroverted factors. First, it is undisputed, based on the Commission hearing officer's decision and the affirmation of that decision by the Commission Appeals Panel, that the Claimant had chronic pain syndrome.⁶ Second, Dr. Vo's testimony that the CPMP was very effective was uncontroverted. He cited the Claimant's GAF score as A45" on July 29, 2003, and A55 to 60" after the program.⁷ Third, ____ expert Roger Canard, D.C., acknowledged he did not review Dr. Vo's medical documentation of the program, including daily treatment notes. Dr. Canard acknowledged he does not know whether the Claimant benefitted from the program. He agreed that a GAF-score increase from 45 to 55-60 was an improvement, but termed it marginal.

____ introduced evidence from several experts saying either that the CPMP was not necessary or that further treatment in general was unnecessary.⁸ Although Dr. Vo's evidence that the

⁶ Ex. 2 at 25, 41-42.

⁷ A GAF score measures a patient's pain and functionality. A higher score shows less pain and more functionality.

⁸ ____ cited the following opinions:

§ The designated doctor providing the Claimant's MMI rating in June 2002 said prolonged therapy was not indicated. (Ex. 1 at K-9.)

program was helpful was far from impressive. For example, he did not introduce his treatment notes into evidence the burden of proof was on ____ to prove the CPMP would not be helpful. Uncontroverted evidence that the program was, in fact, efficacious brought the opinions of ____'s experts into serious question.

Dr. Canard based his opinion that the CPMP was medically unnecessary on two grounds. The first was that the program, initiated a year and ten months after the Claimant's December 2001 operation, was too late to have any reasonable chance of success. He cited medical authority and his own opinion based on over thirty-five years of practice that a CPMP provided more than a year after a patient's last physical trauma is not likely to be efficacious. Dr. Canard's opinion was supported by the above-cited opinions that further services were not necessary and specifically by the peer review that the CPMP was medically unnecessary.

Dr. Vo cited reports from a psychologist and psychiatrist who examined the Claimant,⁹ as well as the IRO physician, concluding that the CPMP would help the Claimant. Dr. Vo testified it is not unusual for a CPMP to start a year and a half post-injury because of delays inherent in the workers' compensation system. Although he acknowledged it is better to start earlier, he said he has an approximate sixty percent success rate providing significant help to patients, regardless of when the program was provided.

§ The Claimant's treating doctor said in August 2002 he did not believe that additional medical care would be reasonable or necessary. (Ex. 1 at L-1.)

§ A ____ peer-review chiropractor said in August 2003, he did not believe the CPMP was medically necessary and also said Dr. Vo told him there had already been eight individual counseling sessions that included biofeedback, relaxation, and music therapy to address stress, chronic pain, and depression. (Ex. 1 at B-2.)

§ In June 2003, another peer review physician concluded that work hardening, psychotherapy, and biofeedback were medically unnecessary. (Ex. 1 at C-5.)

§ An August 2002 peer review concluded that further treatment was unnecessary. (Ex. 1 at D-3-4.)

⁹ Ex. 2 at 32-37 and 38-40.

Dr. Canard's second reason for concluding the program was medically unnecessary was his opinion that the Claimant had received all the elements of a CPMP as part of a pain control protocol after his December 2001 surgery, before Dr. Vo requested a CPMP. He indicated the Claimant had two manipulations under anesthesia (MUAs), two inter-articular steroid injections (ISIs), rehab kinetic exercise therapy, psychological counseling, and biofeedback therapy.¹⁰

Dr. Canard's assertion that a CPMP had already been provided was unconvincing. He did not adequately address the fact that chronic pain syndrome was not even diagnosed before the Claimant saw Dr. Vo. According to Dr. Vo, the purpose of a CPMP was to teach a patient coping skills for living with pain, including relaxation techniques, weaning from medications, and increasing cardiovascular capacity to deal with depression and pain. The CPMP was not to treat the pain.¹¹ The evidence failed to convincingly demonstrate that the MUAs, ISIs, and rehab kinetic exercise therapy were for coping with pain or that they otherwise corresponded to the program described by Dr. Vo. The nature of the psychological counseling was not indicated. Dr. Vo said the purpose of the eight individual counseling sessions before the CPMP began was to see if the Claimant was a CPMP candidate his testimony was persuasive that the biofeedback, relaxation, and music therapy could not all have been provided in those sessions and generally that the sessions were not the equivalent of a CPMP.

II. FINDINGS OF FACT

1. The Claimant sustained a bilateral-shin trauma and right-rotator-cuff-work-related injury/tear on _____.
2. The Claimant underwent right-shoulder-rotator-cuff-partial-tear repair in June 2001, and secondary surgery in December 2001.

¹⁰ Dr. Canard's opinion that the Claimant had biofeedback counseling was apparently based on the peer review doctor's conversation with Dr. Vo reporting Dr. Vo said the Claimant had received biofeedback therapy.

¹¹ Dr. Vo said there are eight techniques in coping skills, including relaxation with imagery and biofeedback to calm the patient down and get him or her to deal with pain, breathing techniques, and hypnotherapy.

3. The Claimant continued to have bilateral shin/knee pain although he has undergone multiple physical therapy sessions, work conditioning and work hardening, and pain management.
4. A designated doctor found that the Claimant reached maximum medical improvement on June 17, 2002, with a 10-percent-whole-person-impairment rating.
5. The Claimant presented to Linh D. Vo, D.C., in 2003, after moving to Houston, Texas, from Dallas, Texas, where his injury occurred.
6. After undergoing treatment from Dr. Vo, including physical therapy and work hardening, Dr. Vo recommended a chronic pain management program (CPMP).
7. The Claimant's employer, Dallas Area Transit Authority (____), denied the request.
8. Dr. Vo requested medical dispute resolution.
9. On September 22, 2003, an independent review organization (IRO) concluded that the CPMP was medically necessary.
10. ____ requested a hearing after the IRO decision.
11. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
12. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
13. Dr. Vo provided twenty sessions of CPMP to the Claimant from September 30, 2003, until November 12, 2004, based on the IRO decision.
14. The Claimant had chronic pain syndrome.
15. The Claimant underwent a CPMP under Dr. Vo to learn coping skills for living with pain rather than treating it.
16. The CPMP included relaxation techniques, weaning the Claimant from medications, and increasing cardiovascular capacity to deal with depression and pain.
17. The Claimant's GAF score rose from 45 on July 29, 2003, to 55 to 60 upon completion of the program.

18. A GAF score measures a patient's pain and functionality. A higher score shows less pain and more functionality.
19. The Claimant did not have a CPMP before the one provided by Dr. Vo.
20. The CPMP Dr. Vo provided to the Claimant was reasonably required by the nature of the Claimant's injury.

III. CONCLUSIONS OF LAW

1. 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.
2. ___ has the burden of proof in this case. 1 TEX. ADMIN. CODE (TAC) ' 155.41; 28 TAC ' 148(h).
3. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. ' ' 2001.051 and 2001.052.
4. ___ did not prove that the CPMP was medically unnecessary. TEX. LAB. CODE ANN. ' 408.021(a).
5. ___ should pay for CPMP. TEX. LAB. CODE ANN. ' 408.021(a).

ORDER

IT IS THEREFORE ORDERED that Dallas Area Rapid Transit pay the reasonable cost, plus applicable interest, of the chronic pain management program provided to the Claimant by Linh D. Vo, D.C., from September 30, 2003, through November 12, 2003.

SIGNED August 30, 2004.

**JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

