

<b>POSITIVE PAIN MANAGEMENT,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>ZURICH AMERICAN INSURANCE CO.,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Positive Pain Management (Provider) requested a hearing to contest a decision by Medical Review of Texas, an independent review organization (IRO), affirming the denial by Zurich American Insurance Company (Carrier) of pre-authorization for an additional 20 sessions<sup>1</sup> of chronic pain management for \_\_\_ (Claimant). The Administrative Law Judge (ALJ) holds that pre-authorization should be ordered for the requested treatment because it is medically necessary to enhance Claimant’s ability to return to work.

**I. JURISDICTION, NOTICE, AND VENUE**

The Texas Workers' Compensation Commission (the Commission) has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T CODE ANN. Chapter 2003. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN., Chapter 2001 and SOAH’s rules, 1 TEX. ADMIN. CODE (TAC) Chapter 155.

Notice of the hearing was sent to the parties on December 15, 2003. Notice and jurisdiction are not contested and are addressed in the Findings of Fact and Conclusions of Law set out below.

ALJ Sharon Cloninger convened the hearing on April 27, 2004. Peter N. Rogers, attorney, appeared by telephone and represented Provider. Carrier was represented by Steven Tipton, attorney, who appeared in person. The record remained open until May 7, 2004, for the parties to submit written closing arguments.

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<sup>1</sup> Carrier previously pre-authorized 10 sessions of chronic pain management which Claimant attended from May 19, 2003, through June 2, 2003. Provider is now requesting an additional 20 sessions of chronic pain management for Claimant.

## II. BACKGROUND

Claimant incurred a compensable injury to his lower back on \_\_\_\_, while working as an electrician's assistant, when he stepped through a window opening about three feet above the ground and landed awkwardly, causing low back and right leg pain, accompanied by numbness. Claimant was diagnosed with disc herniation at two levels. On April 24, 2002, Claimant underwent decompression at two levels, disc excision at L4-5, L5-S1, and bilateral lateral fusion from L4, L5, and S1, with the insertion of a bone graft stimulator. In May and June 2003, Claimant participated in 10 sessions of Provider's chronic pain management program, during which time he said his pain level decreased from 5/10 to 4/10, his depression decreased from 8/10 to 5/10, and his anxiety level remained the same. The record contains no information about any changes to his strength or range of motion as a result of the 10 sessions. On June 26, 2003, Claimant underwent surgery for removal of the bone graft stimulator. Claimant reached Maximum Medical Improvement (MMI) on July 8, 2003, with an impairment rating of 20 percent. He continues to experience chronic low back pain, for which he takes pain medication.

In August 2003, Provider requested pre-authorization for Claimant to participate in a chronic pain management program for an additional 20 days. Carrier denied the request on September 2, 2003. Provider then requested an appeal of Carrier's denial before the Commission's Medical Review Division. The Commission referred the appeal request to an IRO. On November 7, 2003, the IRO issued a letter denying Provider's request. The IRO doctor's rationale was that there was no significant improvement in Claimant's complaints of pain after the first 10 sessions of chronic pain management, that the reported drop in pain level from 5/10 to 4/10 was "hardly any improvement in pain," and that repeating the unsuccessful treatment modalities to marginal, in any, improvements is not reasonable and necessary care. The IRO doctor reasoned that the chronic pain program would not overcome the functional limitations of surgically induced anatomical changes. The IRO doctor noted that the lack of response after 10 days of chronic pain management is a significant indicator that there is little or no chance of change should Claimant undergo the requested treatment plan.

On November 18, 2003, Provider appealed the IRO decision, which culminated in this hearing before SOAH.

## III. DISCUSSION

### A. Applicable Law

The only issue in this case is whether, by a preponderance of the evidence, there is medical necessity for the requested treatment. Medical necessity is defined in TEX. LABOR CODE ANN. §408.021(a), which states:

(a) 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. 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.

Under 28 TAC §148.21(h), the appealing party has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LABOR CODE ANN. § 413.031. Thus, Provider must prove the requested work hardening is reasonably required within the meaning of TEX. LABOR CODE ANN. § 408.021(a).

## **B. Evidence**

Provider called one witness, and offered one exhibit, which was admitted. Carrier called one witness, and offered three exhibits, which were admitted.

### **1. Testimony of Julie Duncan, Ph.D.**

Dr. Duncan, who is Provider's vice-president of clinical management, made a clinical assessment of Claimant, although she did not personally examine him. She testified that a patient is qualified to enter a chronic pain management program if he is suffering from chronic pain, has had no response to primary and secondary levels of treatment, has emotional dysfunction related to pain in two areas of daily living, his interpersonal relationships are affected, he is focused on pain to the extent that it determines how he functions, and he relies on medication to cope with pain.

She said Claimant meets the criteria because he has pain that lasts at least four-to-six hours at a time, he is still in pain two years<sup>2</sup> after his injury, and the pain has not been alleviated by treatments including physical therapy, aquatic therapy, and surgery. She said Claimant is still reporting depression, anxiety, and pain, with depression being a psychological stressor that is one criterion for entrance into a pain management program. She said Claimant's Global Assessment score of 45 indicates Claimant has significant difficulties functioning in his life. She also said that most patients who need pain management are those who have a documented injury, such as Claimant.

Regarding Claimant's change in pain from 5/10 to 4/10 during his participation in the pain management program, Dr. Duncan testified that any decrease in pain is "very good and very promising." She said that following his participation in Provider's pain management program, Claimant was more functional and less depressed. She said Claimant is in danger of developing a disabled lifestyle, and likely will not improve without chronic pain management.

### **2. Testimony of William Blair, M.D.**

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<sup>2</sup> Dr. Duncan's assessment of Claimant occurred in 2003. It has now been three years since his injury.

Dr. Blair, who is an orthopedic surgeon, testified on behalf of Carrier that while he agrees Claimant is a candidate for participation in a chronic pain management program, participation in the program offered by Provider would not meet Claimant's needs. He characterized Provider's program, which includes yoga, hypnosis, and ta'i chi, as "warm and fuzzy." He said protocols such as yoga and hypnosis are not supported by the medical literature. He said Provider did not make objective measurements of Claimant's condition at the beginning, middle or end of the 10 days, so there is no evidence that Claimant condition changed, other than Claimant's subjective reports about his pain and depression levels. He said objective findings would relate to Claimant's strength, range of motion, use of medication, and employment status.

He said he agrees with the points made by the IRO doctor. He said participation in Provider's pain management program will not alter Claimant's MMI status. In a December 12, 2003 peer review, Dr. Blair stated he believes Claimant has suffered serious surgical injury and has no objective need for chronic pain management.

### **3. Documentary Evidence**

On April 30, 2003, Laurie Bizzell, Ph.D., who is Provider's employee, conducted a psychological evaluation of Claimant to determine his suitability to participate in a chronic pain management program. According to her report, Claimant reported his pain to be a severe, dull, constant ache that begins in his lower back and radiates into his right leg. He said the pain continued regardless of chiropractic adjustments, physical therapy, surgery, and aquatic therapy. He said medication relieves his symptoms moderately, but that the pain returns as soon as the medication wears off. He said he has about four hours of interrupted sleep nightly, plus a one or two hour nap during the day. He reported his level of physical activity to be at 53 percent of the pre-injury level, due to pain. He said he thinks something more could be done to eliminate the pain, and that he fears re-injury. Dr. Bizzell recommended chronic pain management to decrease Claimant's pain, depression and anxiety, and to increase his range of motion and strength by 15-20 percent.

In a May 13, 2003 letter, Provider described its pain management program as four hours daily of physical rehabilitation, two-to-three hours per week of individual psychotherapy, one-to-two hours daily of educational/didactic group therapy, two-to-three sessions a week of EMG biofeedback training, and medication management with the goal of downward titration of habit-forming drugs, when appropriate.

## **IV. ANALYSIS**

Provider had the burden of proof in this proceeding. Pursuant to the Texas Labor Code, 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. Under TEX. LABOR CODE ANN. §408.021(a), 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. In this instance, Provider proved by a preponderance of the evidence that chronic pain management is medically necessary for the treatment of Claimant's condition, in that it will relieve the pain naturally resulting from his compensable injury, and that it should be pre-authorized.

Claimant's chronic pain is the natural result of his compensable injury. Treatment including physical therapy, chiropractic adjustments, aquatic therapy, and surgery have not alleviated Claimant's pain. Even Carrier's witness Dr. Blair conceded that Claimant is a candidate for chronic pain management; Dr. Blair's concern was with Provider's program being "warm and fuzzy," and not supported. However, the evidence shows that Provider's pain management program includes four hours daily of physical rehabilitation, two-to-three hours per week of individual psychotherapy, one-to-two hours daily of educational/didactic group therapy, two-to-three sessions a week of EMG biofeedback training, and medication management with the goal of downward titration of habit-forming drugs, when appropriate. Provider presented sufficient evidence that its program of pain management would address Claimant's injury-related psychological issues, and help him learn how to cope with and self-manage his chronic pain. Thus, Provider is entitled to pre-authorization of the requested treatment under TEX. LABOR CODE ANN. § 408.021(a).

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

1. Claimant, an electrician's assistant, suffered a compensable injury to his lower back on \_\_\_\_, when he stepped through an open window and landed awkwardly.
2. Zurich American Insurance Company (Carrier) was the insurance provider for Claimant's employer when Claimant was injured.
3. Claimant was diagnosed with disc herniation at two levels.
4. On April 24, 2002, Claimant underwent decompression at two levels, disc excision at L4-5, L5-S1, and bilateral lateral fusion from L4, L5, and S1, with the insertion of a bone graft stimulator.
5. Claimant has been treated for his compensable injury by several doctors and by Positive Pain Management (Provider).
6. In May and June 2003, Claimant participated in 10 sessions of Provider's chronic pain management program, during which time his pain level decreased from 5/10 to 4/10, his depression decreased from 8/10 to 5/10, and his anxiety level remained the same.
7. Claimant's pain lasts at least four-to-six hours at a time, and has not been alleviated by treatment including physical therapy, aquatic therapy, and surgery.
8. Claimant is depressed and anxious due to his pain.
9. Claimant's Global Assessment score of 45 indicates Claimant has significant difficulties functioning in his life.

10. Claimant is in danger of developing a disabled lifestyle, and likely will not improve without chronic pain management.
11. Twenty sessions of chronic pain management would address Claimant's injury-related psychological issues, and help him learn how to cope with and self-manage his chronic pain.
12. In August 2003, Provider requested pre-authorization from Carrier for Claimant to undergo 20 sessions of chronic pain management, which was denied by Carrier in September 2003.
13. Provider filed a timely request with the Texas Workers' Compensation Commission (TWCC) for medical dispute resolution.
14. Provider's request was randomly assigned to Medical Review of Texas, an independent review organization (IRO), by the Commission's Medical Review Division.
15. The IRO issued a decision November 7, 2003, recommending denial of Provider's request for pre-authorization on the basis that the requested treatment was not medically necessary.
16. On November 18, 2003, Provider requested a hearing before the State Office of Administrative Hearings (SOAH).
17. Notice of the hearing was sent to the parties on December 15, 2003.
18. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
19. Administrative Law Judge Sharon Cloninger convened the hearing April 27, 2004, in the William Clements State Office Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. Peter N. Rogers, attorney, represented Provider, and appeared by telephone. Carrier was represented by Steven Tipton, attorney, who appeared in person. The hearing concluded and the record closed May 7, 2004.

## **V. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §413.031(d) and TEX. GOV'T CODE ANN. Chapter. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. Chapter 2001 and SOAH's rules, 1 TEX. ADMIN. CODE (TAC) Chapter 155.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. § 2001.052.

4. Provider met its burden of proving the pain management sessions are medically necessary and reasonably required within the meaning of TEX. LAB. CODE ANN. § 408.021(a).
5. Based on the foregoing Findings of Fact and Conclusions of Law, the requested 20 sessions of chronic pain management should be pre-authorized.

**ORDER**

**IT IS, THEREFORE, ORDERED** that Zurich American Insurance Company shall provide the 20 sessions of chronic pain management for Claimant as requested by Positive Pain Management.

**SIGNED June 3, 2004.**

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**SHARON CLONINGER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**