

VONO,  
Petitioner

V.

FARMINGTON CASUALTY  
COMPANY,  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

### DECISION AND ORDER

VONO (Petitioner) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through \_\_\_\_, an Independent Review Organization (IRO), denying reimbursement for prescription medications provided to injured worker \_\_\_\_ (Claimant).

After considering the evidence and arguments of the parties, the Administrative Law Judge (ALJ) concludes that Farmington Casualty Company (Respondent) is liable for reimbursing Petitioner the sum of \$995.01 for the prescription medications in issue.

#### I. DISCUSSION

The hearing convened on October 30, 2003, with ALJ Howard S. Seitzman presiding. Petitioner appeared through its designated representative, Nicky Otts. Respondent appeared through its designated representative, Dan Flanagan. Richard Taylor, D.O. testified for Petitioner. The hearing concluded and the record closed that same day. No parties objected to notice or jurisdiction.

Claimant suffered a compensable, work-related injury on \_\_\_\_ to her lower back and right elbow. Some three years later in \_\_\_\_, Claimant experienced a recurrence of symptoms and received treatment at an emergency room. Thereafter, she was treated by Dr. West with conservative modalities, including physical therapy and medications. He prescribed Toradol IM, Celebrex, Soma, Lortab, and Lorcet. The treatment was of minimal benefit. An April 22, 1999 MRI revealed disc desiccation and a bulge at L3-4 with a central disc herniation. On June 3, 1999, Claimant received a lumbar epidural steroid injection. An ovarian cyst, followed by a change of employment, interrupted Claimant's care.

On September 9, 1999, A.J. Bisson, M.D., prepared a peer review. He noted that Claimant was initially evaluated by Dr. West on March 13, 1999,<sup>1</sup> some \_\_\_\_ years after Claimant's injury. Dr. Bisson notes that the 1996 X-rays of the lumbar spine, pelvis and right hip were reportedly non-revealing. Because Claimant did not seek medical attention between May 1996 and March 1999, Dr.

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<sup>1</sup> There appears to be some confusion as to when Dr. West first evaluated Claimant. Dr. Bisson's report proffers March 13, 1999, while Dr. Watters report references April 14, 1999.

Bisson concluded “it is very unrealistic to expect that the current symptoms are in any way related to this \_\_\_ injury.”

Claimant’s treatments resumed on December 1, 2000, when she began seeing Salvador Baylan, M.D. Her symptoms included sharp pain in the lower back and into the buttocks. Dr. Baylan prescribed more therapy, a repeat MRI, an EMG and he prescribed Celebrex, Ambien, Wellbutrin and Hydrocodone 10mg. The January 2002 MRI revealed slight bulging at the L3-4 and L4-5 discs. An EMG revealed evidence of an L5 radiculopathy. Claimant received an epidural steroidal injection on February 1, 2001, but it provided little relief. Dr. Baylan, prescribed the following medications: Ambien, Ativan, Celebrex, Hydrocodone/APAP, Soma (Carisoprodol), and Wellbutrin.

William C. Watters, III, M.D., prepared an “Orthopedic Review” on February 16, 2002. He concurred with Dr. Bisson’s conclusions and rationale.<sup>2</sup>

Petitioner filled Claimant’s February and March 2002 prescriptions from Dr. Baylan between February 18, 2002, and March 18, 2002. Petitioner then billed Respondent \$997.00 for the medications.<sup>3</sup>

Respondent declined to reimburse the medications as medically unnecessary based upon a peer review. Petitioner requested a copy of the peer review report and sought reconsideration of Respondent’s decision. Respondent did not provide a copy of the peer review report and maintained its denial after reconsidering the matter. Based on Respondent’s continued denial, Petitioner sought medical dispute resolution through the Commission. The matter was referred to an IRO designated by the Commission for the review process. The IRO determined that the medications were not medically necessary treatment for Claimant’s compensable injury. Petitioner then requested a hearing before the State Office of Administrative Hearings (SOAH).

## **II. DISPOSITIVE LEGAL ISSUE**

At the hearing, Petitioner raised a number of issues. However, the ALJ finds one issue is dispositive of this case. Specifically, Petitioner contended that Respondent failed to provide any peer review report, despite the fact that it denied reimbursement on the basis of a peer review. Petitioner cited to past SOAH decisions finding in favor of reimbursement under such circumstances. Even though Petitioner raised the peer review issue at the hearing, Respondent did not address this issue. After considering the arguments and authorities presented, the ALJ concludes that Respondent’s failure to provide a peer review report in compliance with the Commission’s rules results in Respondent being liable for reimbursement for the medications in issue.

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<sup>2</sup> In addition, Daniel C. Valdez, M.D., conducted an Independent Medical Examination (IME) on September 10, 2003. There is also a reference to a May 29, 2002 Referred Medical Examination by Victor Lyday, M.D., but no report is in evidence.

<sup>3</sup> Although the amount billed was \$997.00, the amount in dispute is \$995.01 based upon a reduction of the February 18, 2002 Ativan prescription to the MAR.

Commission Rule 133.304(h) requires a carrier who reduces or denies payment for a treatment or service on the recommendation of a peer review to provide a peer review report to the sender of the bill with the explanation of benefits (EOBs).<sup>4</sup> In this case, the evidence establishes that Petitioner did not receive a peer review report with the EOBs denying reimbursement for the medications in issue. After receiving the EOBs, Petitioner requested the peer review. Despite the request, Respondent did not provide a copy. The first time Petitioner saw a peer review was when Respondent filed its evidence in this case.<sup>5</sup>

Under the circumstances, the ALJ concludes that Respondent's denial of reimbursement is legally inadequate, as it has failed to deny reimbursement in compliance with the Commission's rules. This is consistent with past SOAH decisions.<sup>6</sup> Because Respondent has never properly denied reimbursement in compliance with the Commission's rules, it is now required to provide such reimbursement.<sup>7</sup> Based on this threshold legal ruling, the ALJ does not address any medical necessity issues. In support of this determination, the ALJ makes the following findings of fact and conclusions of law.

### III. FINDINGS OF FACT

1. \_\_\_\_ (Claimant) suffered a compensable, work-related injury in \_\_\_\_, to her lower back and right elbow.
2. Some three years later in \_\_\_\_, Claimant experienced a recurrence of symptoms and received treatment at an emergency room.
3. She was then treated by Dr. West with conservative modalities, including physical therapy and medications. He prescribed Toradol IM, Celebrex, Soma, Lortab, and Lorcet.
4. The treatment was of minimal benefit and an April 22, 1999 MRI revealed disc desiccation and a bulge at L3-4 with a central disc herniation. On June 3, 1999, Claimant received a lumbar epidural steroid injection. An ovarian cyst, followed by a change of employment, interrupted Claimant's care.
5. Claimant's treatments resumed on December 1, 2000, when she began seeing Salvador Baylan, M.D. Her symptoms included sharp pain in the lower back and into the buttocks.

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<sup>4</sup> 28 TEX. ADMIN. CODE 133.304(h).

<sup>5</sup> Because Respondent did not comply with 28 TEX. ADMIN. CODE 133.304(h), it is unclear from the evidence which report is the peer review relied upon by Respondent.

<sup>6</sup> See SOAH Docket Nos. 453-02-0991.M5, Decision and Order (April 12, 2002) (ALJ Ingraham); 453-03-2310.M5, Decision and Order (September 3, 2002) (ALJ Wood); 453-03-2355.M5, Decision and Order (July 31, 2003) (ALJ Beeler); and 453-03-3682.M5, Decision and Order (October 17, 2003) (ALJ Bennett).

<sup>7</sup> The ALJ's determination is limited to the facts before him. By providing the peer review report only when it filed its evidence in the SOAH proceeding, Respondent has not denied the claim in a manner consistent with the Commission's rules. The ALJ does not decide whether an initially defective denial can be remedied by the carrier prior to the filing of evidence in the SOAH docket.

6. Dr. Baylan prescribed more therapy, a repeat MRI, an EMG and he prescribed Celebrex, Ambien, Wellbutrin and Hydrocodone 10mg.
7. The January 2002 MRI revealed slight bulging at the L3-4 and L4-5 discs. An EMG revealed evidence of an L5 radiculopathy.
8. Claimant received an epidural steroidal injection on February 1, 2001, but it provided little relief.
9. As part of his course of treatment, Claimant began taking the prescription medications Ambien, Ativan, Celebrex, Hydrocodone/APAP, Soma (Carisoprodol), and Wellbutrin.
10. VONO (Petitioner) filled Claimant's February and March 2002 prescriptions from Dr. Baylan between February 18, 2002, and March 18, 2002. Petitioner then billed Farmington Casualty Company (Respondent) \$997.00 for the medications.
11. Respondent declined to reimburse the medications, as medically unnecessary based upon a peer review.
12. Petitioner requested a copy of the peer review and sought reconsideration of Respondent's decision. Respondent did not provide a copy of the peer review and maintained its denial after reconsidering the matter.
13. Respondent did not provide Petitioner a copy of a peer review until Respondent filed its evidence in the State Office of Administrative Hearings (SOAH) proceeding.
14. It is cannot be determined from the evidence which report is the peer review relied upon by Respondent in denying Petitioner's request for reimbursement.
15. Based on Respondent's continued denial, Petitioner sought medical dispute resolution through the Texas Workers' Compensation Commission (Commission). The matter was referred to an Independent Review Organization (IRO) designated by the Commission for the review process. The IRO determined that the medications were not medically necessary treatment for Claimant's compensable injury.
16. Petitioner then requested a hearing before SOAH. The hearing convened on October 30, 2003, with Administrative Law Judge Howard S. Seitzman presiding. Petitioner appeared through its designated representative, Nicky Otts. Respondent appeared through its designated representative, Dan Flanagan. The hearing concluded and the record closed that same day.
17. The amount in dispute is \$995.01.

#### **IV. CONCLUSIONS OF LAW**

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LABOR CODE ANN. §413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE ch. 148.
3. The request for a hearing was timely made pursuant to 28 TEX. ADMIN. CODE § 148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner has the burden of proof in this matter. 28 TEX. ADMIN. CODE §§ 148.21(h) and 133.308(w).
6. Respondent failed to follow 28 TEX. ADMIN. CODE §133.304(h) by failing to send Petitioner a copy of the peer review with the explanation of benefits form denying payment for the medications in issue.
7. Respondent's filing a copy of a peer review at the evidentiary stage of a SOAH proceeding does not satisfy the requirements of 28 TEX. ADMIN. CODE §133.304(h).
8. Petitioner established, by a preponderance of the evidence, that Respondent failed to properly deny reimbursement for the medications in issue and, therefore, is liable for reimbursing Petitioner for them.

**ORDER**

**THEREFORE IT IS ORDERED** that Farmington Casualty Company reimburse VONO the sum of \$995.01 plus applicable interest for the Ambien, Ativan, Celebrex, Hydrocodone/APAP, Soma (Carisoprodol), and Wellbutrin, provided to Claimant between February 18, 2002, and March 18, 2002.

**SIGNED December 2, 2003.**

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