

LUMBERMENS CASUALTY COMPANY, Petitioner	§ § § § § § § §	BEFORE THE STATE OFFICE
V.		OF
— Respondent		ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Lumbermens Mutual Casualty Company (Carrier) challenges an Independent Review Organization decision granting reimbursement to ___ (Claimant), an injured worker, for prescription drugs. The Administrative Law Judge (ALJ) concludes that because the evidence supports the medical necessity of the prescribed drugs, reimbursement should be granted.

ALJ Gary Elkins convened and closed a hearing on October 2, 2003. Carrier appeared and was represented by Attorney Wayne Gill. Claimant appeared *pro se* and was assisted by Texas Workers' Compensation Commission Ombudsman Barton Levy.

I. DISCUSSION

Claimant suffered compensable injuries to her right shoulder and cervical spine when she was involved in a work-related automobile accident in ____. Over the ensuing years Claimant saw many doctors for the treatment of her injuries, although John Adams, M.D., was her treating physician during that time. Among the diagnostic procedures performed on Claimant were x-rays, a myelogram, a cervical discogram, a CAT Scan, an MRI, and various range-of-motion, strength, and sensory evaluations. These procedures resulted in a diagnosis of cervical strain and a torn rotator cuff in her right shoulder.

Later, bulging discs and a herniated nucleus pulposis were discovered in Claimant's cervical spine. Based on the diagnoses, Claimant underwent a number of treatments, including surgery for her shoulder, physical therapy, cervical neck traction, cervical injections, and psychological counseling. Although a cervical discectomy and fusion were considered by several doctors, one of the doctors, David Duffner, M.D., concluded such surgery was not justified in light of what he described as "a minimal amount of pathology." Other doctors were concerned about the impact Claimant's psychological well-being might play in her prognosis for improvement following such a surgery. Still others expressed concern that a spinal fusion might negatively impact other levels of Claimant's cervical spine in a domino effect that could trigger the need for additional surgeries.

Ultimately, Claimant was found to be at maximum medical improvement (MMI), received an MMI rating, and began receiving drug therapy for chronic pain symptoms. To treat Claimant's pain, Dr. Adams has been prescribing Vicodin, which Claimant has been taking since March 2000. To combat sleeplessness, Claimant has been taking Ambien, also prescribed by Dr. Adams. It is the reimbursement for Claimant's purchases of these drugs from January 3, 2000, through March 27, 2003, that Carrier opposes.

The evidence and argument from neither party was particularly compelling. While it is undisputed that Claimant was injured in an automobile accident and suffers from some pathology of the cervical spine, the results of the various diagnostic procedures and evaluations by no means reflect a consensus in regard to either the seriousness of Claimant's injury or the best means of treating it. However, Claimant did testify about the extent of her pain and resulting physical limitations and sleep problems.

Conversely, Carrier relies on the second-opinion observations of a doctor, Barry Green, M.D., that Claimant should "be off the Vicodin and Ambien." However, Carrier provides no underlying basis for the opinion aside from Dr. Green's opinion that Claimant has developed a tolerance for the Ambien.

Notwithstanding the somewhat ambiguous evidence relating to the present state of Claimant's injury and pain levels, the parties did not argue over whether she is experiencing the pain and sleeplessness she described. It may be true that the continued use of Ambien and Vicodin could result in adverse side effects such as increased tolerances or habituation, as suspected by Dr. Green. Such suspicions by themselves, however, do not establish that the drugs are not medically necessary based on the known facts of this case.

Consequently, and despite the somewhat weak objective medical support for Claimant's continued use of the Ambien and Vicodin, her request for reimbursement should be granted.

II. FINDINGS OF FACT

1. Claimant suffered compensable injuries to her right shoulder and cervical spine in ____.
2. At the time of Claimant's injury, her employer maintained worker's compensation insurance coverage with Lumbermens Mutual Casualty Company (Carrier).
3. Claimant seeks reimbursement in the amount of \$109.72 for costs incurred by her in paying for the prescription drugs Vicodin and Ambien during the time period January 3, 2003, through March 27, 2003.
4. Carrier refused reimbursement for the Vicodin and Ambien, for which Claimant seeks reimbursement before the State Office of Administrative Hearings (SOAH).
5. Notice of the hearing was mailed to the parties July 31, 2003. 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.
6. The hearing convened and closed October 2, 2003, before Administrative Law Judge Gary Elkins. Carrier appeared and was represented by Attorney Wayne Gill. Claimant appeared *pro se* and was assisted by Texas Workers' Compensation Commission Ombudsman Barton Levy.
7. Claimant continues to experience pain and sleeplessness as a result of her injury.

8. Claimant takes Vicodin for the injury-related pain.
9. Claimant takes Ambien for sleeplessness resulting from the injury-related pain.
10. The drugs specified in Findings 8 and 9 have relieved symptoms related to Claimant's injury.
11. Claimant tried over-the-counter drugs in 2002 for pain relief but they did not work.
12. The rate at which Claimant has filled her prescriptions and the dosage in each prescription for Vicodin and Ambien have remained steady.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. chapter 401 et seq.
2. SOAH has jurisdiction over this proceeding pursuant to §413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Carrier has the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.21(h).
5. The prescribed drugs are medically necessary to treat Claimant's compensable injury, as contemplated in § 408.021 of the Act.

ORDER

IT IS ORDERED that Claimant is entitled to reimbursement in the amount of \$109.72 for costs incurred by her in paying for the prescription drugs Vicodin and Ambien during the time period January 3, 2003, through March 27, 2003.

SIGNED October 27, 2003.

**GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**