

SOAH DOCKET NO. 453-04-0822M5R

PACIFIC EMPLOYERS INSURANCE	§	BEFORE THE STATE OFFICE
COMPANY,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
—”	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Pacific Employers Insurance Company (Carrier) challenged the decision of the Medical Review Division (MRD) of the Texas Workers’ Compensation Commission (Commission) ordering the Carrier to pay for certain medications for ___ (Claimant) for the period December 28, 2002, through April 10, 2003. The MRD concluded that the medications were medically necessary to treat Claimant. During the disputed period, Claimant had paid for the medications herself as Carrier had ceased reimbursing Claimant’s pharmacy for the drugs at issue before December 28, 2002.

Based on the evidence, Carrier failed to meet its burden of proof to show that some of the medications prescribed for Claimant were not medically necessary, specifically it failed to demonstrate that Zanaflex (Tizanidine), Bextra, Clonazepam (Klonopin), and Lidoderm patches were not needed to properly treat Claimant. Carrier should reimburse Claimant the amounts she paid for these medications purchased between December 28, 2002, and April 10, 2003; a total of \$502.16. However, Carrier met its burden of proof to demonstrate there was no medical necessity for the other medications prescribed, specifically the following: Keratine cream (Keta/Neur/Clon/Bac Compound), Zonalon cream, Norflex, MS Contin (morphine), Detromethorphan, Lasix, Phenergan (Promethazine), Imitrex, Tegaderm w/ Lidoderm, Miralax powder, Famotidine, and Senokot.

The hearing in this matter convened on March 31, 2004, in Austin, Texas, with Administrative Law Judge (ALJ) Cassandra Church presiding. The ALJ closed the record on April 23, 2004, upon receipt of the parties’ closing arguments. Claimant appeared on her own behalf, assisted by Juan Mireles of the Commission’s Ombudsman Office. Carrier was represented by Laurie Gallagher, attorney. The Commission did not participate in the hearing.

I. DISCUSSION

A. Post-Hearing Evidence

In its closing argument, Carrier objected to those portions of Claimant’s closing argument, filed April 14, 2004, that amounted to testimony offered after the record had closed. Carrier asserted that those portions of Claimant’s filing that were factual should not be considered by the ALJ, on the basis Carrier had no opportunity to cross-examine Claimant on her factual statements. Carrier’s

objection is sustained. A party in an administrative hearing has a right to cross-examine witnesses. TEX. GOV'T CODE ANN. § 2001.087. Only testimony and documents offered by Claimant at the hearing on the merits will be considered evidence in this case. However, to the extent that Claimant's April 14, 2004, letter consists of argument based on facts in the record, it will be considered.

B. Issue of Payment

In its closing argument, Carrier asserted that Claimant had failed to demonstrate that Claimant had actually paid for the medications at issue. As the only issue in this case is medical necessity, Carrier's argument on payment will not be entertained. Further, it was not timely asserted, being raised for the first time after the close of the hearing on the merits. The ALJ also notes there was credible evidence in the record from which the inference could be drawn that Claimant did pay for the medications.¹

C. Burden of Proof

In its closing argument, Carrier asserts Claimant has the burden of proof to demonstrate medical necessity as she initially requested reimbursement. Following a long history of cases decided at SOAH, the ALJ concludes that the party bringing the action at SOAH has the burden of proof, which in this case is Carrier.

D. Medical Necessity

On___, Claimant injured her left knee and hand in a fall in the parking lot at her job. She was treated conservatively, with treatments including casting of a finger for fracture, physical therapy, and passive modalities. Claimant returned to work, but continued to experience pain in her left arm, ankle, and knee. She underwent some type of work conditioning or work hardening. However, Claimant ceased working due to ongoing pain.

During the four-month period at issue, Claimant had been prescribed approximately 20 medications to treat her chronic pain condition. The medications included anti-depressants, both ingestible and topical pain relievers, and a variety of medications designed to treat side effects of the various drugs taken.² Only the pain relief drugs and the drugs for side effects are at issue; Carrier

¹ Respondent's Exh. 1, pp. 24-33.

² Medication table:

Date of Service	Medication	Cost
12/28/02	Lidoderm Patches	\$150.99
12/28/02	Zonalon Cream	\$60.69

reimbursed Claimant for anti-depressant drugs. At issue is whether some or all the medications prescribed during this period were medically necessary.

Carrier elected to focus its primary case on an indirect argument. That is, Carrier questioned whether Claimant had been incorrectly diagnosed as suffering from reflex sympathy dystrophy disorder (RSD), arguing that the medical evidence did not show the specific physical indicators for the disease. Broadly speaking, RSD is abnormal reactions of the nervous system response to an injury. Carrier argued either that RSD was an inaccurate diagnosis, or an out-of-date one, the RSD condition having subsided by the time Claimant purchased the medicines at issue. Carrier also suggested that Claimant's symptoms, even if arising from RSD, had expanded well beyond the body areas included within the compensable injury. Although this stance implied an underlying compensability issue, the ALJ concluded that it is spurious in this case. The medications at issue were primarily ingested, so it is impossible to distinguish a targeted from a non-targeted body area.

12/28/02	Tegaderm	\$72.19
12/28/02	Tizanidine/Zanaflex	\$229.19
12/28/02	Bexra	\$90.99
01/08/03	Furosemide/Lasix	\$7.99
01/08/03	Clonazepam/Klonopin	\$30.99
11/11/03	Miralax Powder	\$29.69
01/11/03	Tegaderm	\$114.97
01/11/03	Imitrex	\$309.38
01/13/03	Senokot	\$56.97
01/13/03	Famotidine/Pepcid	\$23.99
01/13/03	Orphenadrine/Norflex	\$48.59
03/04/03	MS Contin/Morphine	\$130.59
04/10/03	Keta/Neur/Clon/Bac Cmpd/Ketamine Cream	\$98.00
04/10/03	Dextromethorphan	\$326.30
04/10/03	Promethazine/Phenergan	\$82.10
	Total	\$1,863.61

Claimant asserted that she was suffering during the disputed period from RSD. She relied on the diagnoses made by several physicians who had treated her during the approximate three years between November 1999 and April 2003.

Pushed to the background in the course of this debate was the issue of whether the medications at issue were appropriate to treat Claimant for either chronic pain generally or for RSD in particular. Implicit in the Carrier's argument against the accuracy of the diagnosis is the notion that, had the RSD diagnosis been accurate, most of the pain-relief medications at issue *would have been appropriate* to treat RSD. In the alternative, Carrier argued that the medications, most prescribed for pain relief, were not needed because the evidence showed that medications failed to provide significant pain relief. Carrier also argued that medications prescribed to counter side effects of the pain-relief drugs were not necessary because there was no evidence Claimant was experiencing drug side effects during the disputed period.

Claimant relied entirely on the medical records and diagnoses of her treating doctors, who contended that all drugs at issue were appropriate treatment for Claimant's RSD.

On December 27, 2002, Sanford Kiser, M.D., diagnosed Claimant as having chronic pain on the left side of her body, with RSD symptoms in her upper left arm, as well as moderate depressive disorder. In a letter to the Carrier, he argued that the medications at issue were needed to provide both direct pain-relieving effects (analgesic) and to treat secondary symptoms and problems that mutually aggravate each other.³ However, he did not identify any specific side effects Claimant had experienced in using the prescribed pain relievers. Dr. Kiser prescribed most of the medications at issue, and noted that many of the medications used have been found to have off-label uses for treatment of chronic pain conditions. Kevin Christensen, M.D., an orthopedist, testified that the medications prescribed were needed, although he acknowledged he was not the doctor monitoring Claimant's overall health care plan. Nor was he the initial prescriber of most of the drugs, although he had refilled some of Dr. Kiser's prescriptions. Neither Dr. Kiser's written comments nor Dr. Christensen's testimony was clear as to what secondary symptoms were being treated by which drug, or exactly how the rather complex combination of medications was effective in relieving or reducing Claimant's pain. Throughout the period Claimant continued to report very high pain levels. Carrier Exhs. 1 and 2.

In April 2002, the TWCC-designated doctor, Oscar Molina, M.D., diagnosed Claimant as having progressive RSD, left wrist strain, left knee internal derangement, and depression.⁴ However, his examination was focused on Claimant's physical functioning, and it did not appear he prescribed test for Claimant's RSD signs. As such, it has limited authority in regard to the narrow issue of

³ Resp. Exh. 1, pp. 7-9.

⁴ Carrier Exh. 1, pp. 550-563.

appropriate medications. It would also appear that by the time Dr. Molina examined Claimant in April 2002, a number of the medications prescribed in the proceeding four months-and possibly before-had been discontinued.

Terrence J. Wilson, M.D., Carrier's medical expert, stated that the RSD diagnosis was not supported by objective physical evidence. Resp. Exh. 2, pp. 20-22.

In August and September 2002, Christopher J. Tucker, D.O., specifically evaluated Claimant's medication use. He recommended continuation of a number of the medications, but found no clear evidence to support many of them. Specifically, he found evidence for continued use of Zanaflex (Tizanidine), Bextra, Clonazepam (Klonopin), and Lidoderm patches.⁵ He concluded there was no clear evidence to support continuing use of Keratine cream (Keta/Neur/Clon/Bac Compound), Norflex, MS Contin (morphine), Detromethorphan, Lasix, Phenergan or Imitrex. The ALJ found Dr. Tucker's analysis persuasive as a contemporaneous analyses that directly addressed the application of particular medications to Claimant's particular symptoms. Although Dr. Christensen and Dr. Kiser stated generally chronic pain patients require custom-tailored medication regimes, there was virtually no evidence in the record concerning the uses of the particular pain-relief medications at issue in regard to Claimants condition as it presented during the particular period at issue. The ALJ also found the record barren of credible evidence demonstrating that Claimant suffered from numerous and persistent side effects of the pain-relief drugs during the four-month period at issue.

In summary, Carrier carried its burden of proof in regard to some, but not all of the medications at issue. Claimant is entitled to reimbursement for out-of-pocket expenses she incurred in the amounts and for the medications as set forth in the Order below.

II. FINDINGS OF FACT

1. On ____, ____ (Claimant) suffered a compensable injury to her left knee and hand in a fall in the parking lot at her job.
2. Pacific Employers Insurance Company (Carrier) was the responsible insurer.
3. Immediately after the injury, Claimant was treated conservatively including casting of a finger fracture, physical therapy, and passive modalities. She underwent physical therapy and work conditioning or hardening.

⁵ Carrier Exh. 2, p. 619.

4. Notwithstanding the absence of measurable physical injury, Claimant continued to experience persistent episodes of pain in her left arm and in other parts of her body. Claimant was diagnosed as having reflex sympathy dystrophy disorder (RSD) and/or chronic pain syndrome. Claimant continues to experience persistent pain.
5. Between December 28, 2002, and April 10, 2003, Sanford Kiser, M.D., prescribed a variety of medications for direct pain relief, for depression, and for relief from side effects of pain relief drugs administered.
6. On or before December 28, 2002, Carrier discontinued payment of many of the medications prescribed for Claimant.
7. Between December 28, 2002, and April 10, 2003, Claimant continued to fill prescriptions of the disputed medications set forth in Findings of Fact Nos. 8-10, and then sought reimbursement from Carrier.
8. Zanaflex (Tizanidine), Bextra, Clonazepam (Klonopin), Lidoderm Patches were necessary to treat Claimant's persistent pain.
9. Keratine cream (Keta/Neur/Clon/Bac Compound), Zonalon cream, Norflex, MS Contin (morphine), Detromethorphan, Lasix, Phenergan (Promethazine), Imitrex, Tegaderm, Miralax powder, Famotidine, and Senokot were not necessary to treat Claimant's persistent pain or side effects of other prescribed medications.
10. Claimant appealed the Carrier's denial of reimbursement to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission).
11. On July 18, 2003, based on the review by an Independent Review Organization (IRO), Independent Review Incorporated, the MRD ordered reimbursement for all medications.
12. On August 4, 2003, Carrier requested a hearing on the MRD decision.
13. On October 22, 2003, the Commission issued a notice of hearing that included the date, time, and location of the hearing, the applicable statutes under which the hearing would be conducted, and a short, plain statement of matters asserted. The case was continued on motion of the parties.
14. Administrative Law Judge Cassandra Church conducted a hearing on the merits of this case on March 31, 2004, and the record closed that day.

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 and TEX. GOV'T CODE ANN. ch. 2003.
2. Provider timely requested a hearing, as specified in 28 TEX. ADMIN CODE § 148.3.
3. Proper and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Carrier, as the petitioning party, has the burden of proof in this proceeding, pursuant to TEX. LAB. CODE ANN. § 413.031 and 28 TEX. ADMIN CODE § 148.21(h).
5. Carrier failed to meet its burden of proof to show that the medications listed in Finding of Fact No. 8 were not medically necessary between December 28, 2002, through April 10, 2003, to treat or reasonably required to relieve the effects of or promote recovery from a compensable injury suffered by Claimant, within the meaning of TEX. LAB. CODE ANN. §§ 408.021 and 401.011(19).
6. Carrier met its burden of proof to show that the medications listed in Finding of Fact No. 9 were not medically necessary between December 28, 2002, through April 10, 2003, to treat or reasonably required to relieve the effects of or promote recovery from a compensable injury suffered by Claimant, within the meaning of TEX. LAB. CODE ANN. §§ 408.021 and 401.011(19).

ORDER

IT IS ORDERED that Pacific Employers Insurance Company reimburse Claimant a total of \$502.16 for the purchase of Lidoderm patches, Tizanidine (Zanaflex), Bextra, and Clonazepam (Klonopin) during the period December 28, 2002, through April 10, 2003.

SIGNED June 21, 2004.

**CASSANDRA J. CHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**