

**SOAH DOCKET NO. 453-04-2736.M5  
[TWCC MDR NO. M5-03-2733-01]**

<b>EMPLOYERS INSURANCE COMPANY OF WAUSAU, Petitioner</b>	:	<b>BEFORE THE STATE OFFICE</b>
	:	
	:	
<b>V.</b>	:	<b>OF</b>
	:	
<b>HIGHPOINT PHARMACY, Respondent</b>	:	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Employers Insurance Company of Wausau (Carrier or Petitioner) is contesting charges for ten prescriptions filled for an injured worker by Highpoint Pharmacy (Respondent) between June 5, 2002, and February 4, 2003, in the amount of \$1,251.35.<sup>1</sup> The Administrative Law Judge (ALJ) concludes that these medications were not medically necessary for the compensable injury. Therefore, Carrier is not required to reimburse Highpoint Pharmacy for the cost of the medications.

**I. NOTICE, AND JURISDICTION**

The parties did not contest notice or jurisdiction. Therefore, those issues are addressed only in the findings and fact and conclusions of law.

**II. DISCUSSION**

**A. Background.**

Claimant sustained a work-related low back sprain/strain injury on \_\_\_\_\_, when he repeatedly lifted several concrete cylinders that weighed thirty to thirty-five pounds. He consulted Lyle Hodge, D.C., on October 10, 1991. Dr. Hodge diagnosed his injury as a lumbar sprain/strain.<sup>2</sup> The treatment plan was chiropractic manipulation with physical therapy. Claimant's prognosis was fair, with recovery expected in four to six weeks. He was expected to return to work within a week.

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<sup>1</sup> Petitioner's Exhibits 1, p. 4 indicates the amount is \$1251.36, but this seem to be an addition error.

<sup>2</sup> Petitioner's Exhibit 1, p. 66.

Claimant did not return to work within a week. In fact, he has continued to report low back pain since the injury, although there have been periods when he seemed to have little trouble with it. There is nothing in the evidentiary record that indicates this injury did any structural damage to Claimant's spine. An MRI in November 1991 revealed the beginning of degenerative changes in the L4-5 disc, but no evidence of herniation. A later reevaluation of the MRI noted a mild annulus protrusion, but there was no impingement on the nerve roots and exiting canals.<sup>3</sup>

Claimant returned to Dr. Hodge a few months later, in January 1992, complaining that the hyperextension exercises he was doing in rehabilitation were increasing his pain. He was pulled from the program and given muscle relaxants. Dr. Hodge ordered a bone scan and a lumbar CT scan to determine whether the exercises had done any damage to the disc that showed degenerative changes. Each was reported to be normal.

Dr. Hodge also referred Claimant to a specialist in neurological surgery, Dr. Jacob Rosenstein. Dr. Rosenstein is the doctor who prescribed the medications at issue in this case. Dr. Rosenstein first examined Claimant in February 1992, about the time Dr. Hodge was explaining to the Carrier that, although Claimant was improving slowly, he could not predict when his treatment might end.<sup>4</sup>

The ten prescriptions at issue are for Hydrocodone/APAP (a painkiller), Carisoprodol (a muscle relaxant), and Prevacid (for gastrointestinal distress). Muscle relaxants and drugs to treat gastrointestinal distress had been prescribed throughout the course of Claimant's treatment. Brand name variations of Hydrocodone/APAP first appeared in Claimant's records in approximately 1997.

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<sup>3</sup> Petitioner's Exhibit 1, p. 72.

<sup>4</sup> Petitioner's Exhibit 1, pp. 75-77.

## **B. Evidence and Argument**

### **1. Petitioner**

Petitioner asserts that the drugs that were dispensed to Claimant on the dates in issue are medically unnecessary per peer review or, in the case of the last two prescriptions, were not related to the covered work injury.<sup>5</sup> The peer review concluded that the original injury was clearly no more than a low back strain/sprain injury. It also concluded that treatment should have ended within three to six months of the original injury date, and that any current complaints had no relationship to the original injury.

At the hearing, Petitioner offered medical records into evidence and called Neal Blauzvern, D.O., to testify.<sup>6</sup> Dr. Blauzvern opined that Claimant had experienced a lumbar low back sprain/strain injury that should have required no more than eight-to-twelve weeks of therapy. He testified that a combination of four to six weeks of passive modalities, followed by four to six weeks of active exercise therapy would have been reasonable, necessary, and supported by the medical literature. He said that one might also add anti-inflammatory or muscle relaxant drugs in the *initial* phase of treatment.

Dr. Blauzvern noted that Claimant's November 1991 MRI reported evidence of disc degeneration, but no evidence of disc herniation. Disc degeneration, he said, is a normal part of life. It could be made symptomatic, he testified, but it was not caused by the work-related injury. In his opinion, the records did not reflect any pain-generating structural abnormality.

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<sup>5</sup> This Decision will not hereafter distinguish between the denials based on medical necessity and the two prescriptions denied based on the code for Anot related to the compensable injury. Obviously, prescriptions not related to the compensable injury are not medically necessary within the context of Workers' Compensation.

<sup>6</sup> Dr. Blauzvern graduated from medical school in 1983. After completing his training through internship, residency, and fellowships, Dr. Blauzvern became co-director of a pain clinic at Wilford Hall Air Force Medical Center in San Antonio in 1987. He remained there until 1990. After that, he practiced full time pain management in Dallas for four years. For the last ten years, he has been in chronic pain management in Austin. He said he had treated many patients with low back injuries.

Dr. Blauzvern acknowledged that the post-discogram CT scan taken in January 1992 reflected a vertical annular tear, but asserted that only *radial* annular tears generate pain. The nerve supply, he stated, is along the outermost annular ring, around the periphery of the disc. He testified that a tear has to extend through the wall into the periphery of the disc to cause pain.

Dr. Blauzvern disagreed with the pain management protocol being used in this case. First, he opined that a lumbar sprain/strain should not require a decade of muscle relaxants, such as Carisoprodol, and opiates like Hydrocodone/APAP. He challenged assertions made in Dr. Rosenstein's letter of medical necessity.<sup>7</sup> First, Dr. Rosenstein justified the use of Hydrocodone/APAP by saying it was appropriate for use to treat breakthrough pain not adequately controlled by long-acting opioids.<sup>8</sup> Dr. Blauzvern pointed out, though, that the Claimant was not taking long-acting opioids. He also opined that Hydrocodone/APAP was highly addictive and should not be prescribed for long term use, especially where, as in this case, there was no evidence that the State guideline for the use of opiates for use in managing chronic pain was being followed. That rule, he said, requires a written treatment protocol, progress notes, and demonstration of a functional improvement without side effects.

Second, in his letter of medical necessity, Dr. Rosenstein stated that the use of a drug like Carisoprodol, a skeletal muscle relaxant, was well documented as adjunctive therapy in the management of chronic pain, and that healing is hampered by muscle spasms. Dr. Blauzvern disagreed and asserted that its use was not appropriate in this case because the medical records did not include any evidence that Claimant suffered from chronic muscle spasm. He said this drug is not indicated for the treatment of chronic pain and does not promote the healing of muscular injuries. Further, Dr. Blauzvern testified that Carisoprodol, like Hydrocodone/APAP, is highly addictive and not appropriate for long term use.

Third, Dr. Rosenstein asserted that the use of Prevacid was appropriate because pyrosis and dyspepsia are common side effects of opioids, benzodiazepines, and tricyclic antidepressants. He

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<sup>7</sup> Respondent's Exhibit 3.

<sup>8</sup> Respondent's Exhibit 3, p. 1.

also stated that proton pump inhibitors, such as Prevacid, are effective and appropriate for proper management of nonerosive GERD (gastroesophageal reflux disease); and that symptomatic relief is important to enhance compliance efforts. Dr. Blauzvern had a contrary view and said that the use of Prevacid to treat the dyspepsia caused by the other drugs is ill-advised because it can cover up symptoms without preventing or treating the possible side effects of gastric erosion or ulceration. This, he said, can give the patient a false sense of security.

Finally, Dr. Blauzvern testified it was not reasonable to allow Claimant to take these drugs on an as needed basis and refill them every couple of months when he makes an office visit. This is especially true, he said, when there is no evidence of pain diagrams or a pain diary documenting how much medication Claimant is taking between office visits. He reiterated that such use exposes Claimant to the highly addictive effects of Hydrocodone/APAP and Carisoprodol and did not comply State guidelines for using such drugs.

## 2. Respondent

Respondent presented medical records and called Rick Taylor, D. O. as a witness.<sup>9</sup> Dr. Taylor testified that the medical records indicate Claimant injured his lumbar spine, and that the discogram done December 22, 1992, confirmed he had a legitimate pain generator at the L4-5 level. He opined that, in medical probability, that pain generator is related to the compensable injury of the lumbar spine. He testified that a vertical annular tear would also be a pain generator because the annulus fibers are loaded with nerve endings and that any disruption in that structure would be painful. It is irrelevant, he opined, whether the tear was vertical or horizontal.

As to the drugs in question, Dr. Taylor opined that the Prevacid was appropriate to prevent medication-induced gastritis and that it was not necessarily inappropriate to prescribe opioid medications for long term pain relief where, like here, there is an objectively defined pain generator,

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<sup>9</sup> Dr. Taylor is a 1992 graduate of the Kirksville College of Osteopathic Medicine and practices primarily occupational medicine and pain management in Palestine, Texas. He is board certified by the American Board of Family Practice and is completing board certification by the American Academy of Pain Management.

like the discogram that obtained an extremely positive response at the L4-5 level.<sup>10</sup>

Dr. Taylor also testified there was no evidence in Claimant's medical records that he was addicted to the Hydrocodone/APAP. Such evidence, Dr. Taylor said, might include evidence of inappropriate behavior or escalating dosages. He acknowledged that patients using these kinds of drugs need to be on a monitored pain management program, but said he thought Claimant was on such a program. He also pointed out that a physical dependence on opioids is common for anyone who takes them for any length of time, but that such a physical dependence is not the same thing as addiction. He also stated that addiction develops in less than five percent of the people who take opioids long-term.

In response to Dr. Blauzvern's testimony that he saw no need for the muscle relaxant, Carisprodol, in Claimant's medical records, Dr. Taylor replied that the second most common physical finding in a patient with an intrinsic disruption in a disc (after pain), is muscle guarding and spasm. He said it was hard for him to imagine that Claimant did not have muscle spasms.

### **C. Analysis and Conclusion**

The ALJ concludes that the medications at issue were not medically necessary. The greater weight of the evidence proves that Claimant suffered a lumbar strain/sprain at work in 1991 and should have recovered from it long ago. Claimant does apparently suffer from degenerative changes in the L4-5 area, and may need medical care related to those changes. But that condition is not related to his work injury.

An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury, including health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. ' 408.021. Health care@ includes a prescription drug, medicine, or other remedy. TEX. LAB. CODE ANN. ' 401.011(19)(E).

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<sup>10</sup> Dr. Blauzvern attributed the positive L4-5 discogram which was done over a year after the original injury Claimant's degenerated disc, not to the lumbar sprain/strain.

There was evidence of a small vertical tear in the annulus, but there was conflicting testimony about whether the tear was a significant pain-generating injury. Both testifying doctors had excellent credentials, but the ALJ is persuaded by Dr. Blauzvern ' s testimony that the small tear was not a pain generator because only a radial tear extending into the periphery would generate pain. His testimony is reinforced by the doctor who reported on the discogram procedure, who also indicated there was no evidence of a radial tear extending into the periphery.<sup>11</sup> Further, the ALJ is persuaded that even if the small vertical tear@ did cause pain in December 1992, there is no evidence that it was caused by the work injury or that it would still be responsible for pain a decade later.

The medications at issue in this case, prescribed for a lumbar sprain/strain over a decade after it occurred, were not reasonable and necessary. Neither is it reasonable treatment for the treating physician to continue prescribing Hydrocodone/APAP and Carisprodol, both potentially addictive drugs, for such a long period of time without a monitoring program.

Respondent argued that pharmacies do not routinely receive medical necessity documentation from doctors. They look generally to see if a drug seems reasonable for treatment of a work-related injury and then, typically, fill the prescriptions as directed by doctors. Respondent also argued that Carrier had paid for these prescription drugs as recently as June 2002, and although it recognized that did not legally obligate Carrier to continue paying, it stated that the pharmacy does look at such indicators before filling prescriptions.

The ALJ recognizes the pharmacy is in a difficult position in a case like this. However, the ALJ is persuaded that in this case, when the original injury occurred so long ago and the drugs involved were questionable for long-term use, the pharmacy should have required more from the doctor. All medical services provided under the Workers ' Compensation program must be medically necessary. In this case, the Carrier has proved these services were not.

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<sup>11</sup> Petitioner ' s Exhibit 1, p. 74.

### III. FINDINGS OF FACT

1. Claimant sustained a work-related injury on \_\_\_\_\_, when he was lifting concrete cylinders that weighed thirty to thirty-five pounds.
2. Claimant ' s injury was diagnosed as a lumbar sprain/strain and was initially treated with chiropractic care and physical therapy.
3. Claimant did not improve as expected and, in November 1991, a lumbar MRI was performed.
4. The MRI revealed degenerative changes at L4-5, but no herniation, and no other abnormalities. It was re-evaluated by another radiologist who also noted a mild posterior annulus protrusion at L4-5, centrally touching the dural sac but with no deformity. There was no impingement on the nerve roots and the exiting canals were normal.
5. Dr. Jacob Rosenstein, neurosurgeon and prescribing physician for the disputed medications, first saw Claimant in February 1992. His impressions included probable internal disc disruption syndrome and lumbar disc derangement L4/5. At that time, Dr. Rosenstein prescribed a muscle relaxant and an anti-inflammatory for Claimant.
6. The medications in dispute in this case are Hydrocodone/APAP, a pain reliever; Carisoprodol, a muscle relaxant; and Prevacid, for gastrointestinal distress.
7. In December 1992, more than a year after the original injury, Dr. Rosenstein performed a lumbar discogram at three levels. Claimant ' s symptoms were reproduced with an intensity of 10/10 when the L4-5 disc was injected.
8. The CT scan taken following the discogram revealed a small tear in the annulus, but no radial tear extending into the periphery.
9. Physical therapy and work hardening programs were prescribed for Claimant in 1991, 1992, and 1997, at least, but he did not have success with these therapies.
10. Dr. Rosenstein suggested that Claimant consider surgery, but he did not undergo surgery.
11. Dr. Rosenstein continued to see Claimant and to prescribe muscle relaxants that were used on an occasional basis. Sometimes he also prescribed anti-inflammatories.
12. After microcurrent therapy in 1993, Claimant ' s pain level was at 2/10. Dr. Rosenstein gave him a release to work with restrictions: no lifting more than 20 pounds and no repetitive bending.
13. In 1994, 1995, and 1996, Claimant only consulted with Dr. Rosenstein five times.
14. In October 1996, Dr. Rosenstein noted a recent exacerbation of Claimant ' s low back pain

and, in October 1997, he first prescribed a form of Hydrocodone/APAP.

15. During the years between 1997 and the dates in dispute, Dr. Rosenstein continued to see Claimant and, on occasion, to prescribe Hydrocodone/APAP and muscle relaxants.
16. Highpoint Pharmacy (Respondent) filled prescriptions for these three drugs in June and July 2002, and in February 2003, and billed Petitioner \$1251.35 for the medications.
17. Employers Insurance Company of Wausau (Petitioner or Carrier) refused to reimburse Respondent for the medications.
18. Respondent sought medical dispute resolution through the Texas Workers' Compensation Commission.
19. The Independent Review Organization (IRO) and the Medical Review Division (MRD) determined Carrier should pay the Respondent for the medications.
20. Petitioner then requested a hearing before the State Office of Administrative Hearings. The hearing convened on June 14, 2004, with Administrative Law Judge Nancy N. Lynch presiding. Petitioner appeared through its designated representative, Kevin J. Franta. Respondent appeared through its designated representative, Nicky Otts. The hearing concluded that day and the record closed on June 28, 2004.
21. Claimant's ongoing symptoms are associated with the degenerative changes in his discs associated with aging and current activity rather than his October 1991 work-related injury.
22. The medications prescribed in this case, Hydrocodone/APAP, Carisoprodol, and Prevacid, were not medically reasonable and necessary for the treatment of Claimant's work-related injury.

#### **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. The prescriptions for Hydrocodone/APAP, Carisoprodol, and Prevacid filled between June 5, 2002, and February 4, 2003 were not medically reasonable and necessary under TEX. LABOR CODE ANN. ' 408.021.
7. Respondent is not entitled to payment in the amount of \$1,251.35 for the disputed medications.

**ORDER**

**THEREFORE IT IS ORDERED** that Employers Insurance Company of Wausau is not required to pay to Highpoint Pharmacy the sum of \$1,251.35 for the Hydrocodone/APAP, Carisoprodol, and Prevacid provided to Claimant between June 5, 2002, and February 4, 2003.

**SIGNED, September 10, 2004.**

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**NANCY N. LYNCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**