

**SOAH DOCKET NO. 453-04-3451.M5
TWCC MDR NO. M5-04-0885-01**

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| —, | § | BEFORE THE STATE OFFICE |
| Petitioner | § | |
| | § | |
| V. | § | OF |
| | § | |
| TPCIGA FOR RELIANCE | § | |
| NATIONAL INDEMNITY, | § | |
| Respondent | § | ADMINISTRATIVE HEARINGS |

DECISION AND ORDER

Petitioner ___ (Claimant) appealed the decision of the Texas Workers' Compensation Commission (the Commission/TWCC) to dismiss the medical dispute resolution. TWCC dismissed the appeal contending that: (1) Petitioner did not timely file the appeal, and (2) Petitioner failed to provide the documentation required by 28 TEX. ADMIN. CODE (TAC) § 133.308(f). Consequently, TWCC did not address the medical necessity of Claimant's prescriptions.¹ TPCIGA for Reliance National Insurance (Carrier) denied payment for Claimant's prescriptions asserting the medication was not medically necessary and moved to dismiss a portion of the claims as being untimely filed. In Order No. 2, the Administrative Law Judge (ALJ) dismissed Claimant's reimbursement claims that were not timely filed (July 7, 2001, to November 24, 2002) in compliance with 28 TAC § 133.307 (c) and (d). The ALJ finds that Claimant's claim for \$1,510, as reimbursement for the prescriptions filled from November 25, 2002, through October 20, 2003, is denied because the medications were not medically necessary to treat the compensable injury.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction or notice. Those issues are set out in the Findings of Fact and Conclusions of Law.

On November 10, 2004, the hearing in this matter convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Catherine C. Egan. Ombudsman Luz Loza assisted Claimant. Attorney Erin Shanley represented Carrier. Following the receipt of evidence and the parties' arguments, the ALJ closed the record the same day.

¹ The Administrative Law Judge discussed Carrier's motion to dismiss in Order No. 2. The timeliness of Claimant's request for reimbursement will not be addressed until the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Claimant's Background and Position

Claimant sustained a compensable injury while working on ____, when his left shoulder snapped and he fell back into a machine. In November 1995, Claimant underwent surgery and was unable to work for two years. In 1997, Claimant was told by his doctor that he should undergo a second surgery to remove scar tissue around the first surgical site, but he refused. Because Claimant could not continue to do manual labor, he returned to school. As a result of this education, Claimant has been able to work part-time for the past seven years doing office work. During the past seven years, he has taken Soma, Xanax, and Tylenol #3, all prescription medications (the pain medications). According to Claimant, these medications are essential so he can concentrate at work because he continues to experience pain in his left shoulder and to lose concentration. Although he tried anti-inflammatory medications (Vicodin, Motrin, and Darvocet), he quit taking them because they made him sick.

According to Claimant, Carrier quit paying for the pain medications in 1999. When he stopped taking the medications, he could not continue working because he developed a nervous disorder, had pain in his shoulder, and could not concentrate. He testified that he began drinking beer to ease these conditions. Explaining that the pain medications help him cope with his job, Claimant paid for the medications himself. William Wisner, M.D., his treating physician and an orthopaedic surgeon, knows that Carrier has denied payment for these medications, but he continues to prescribe them to Claimant.

In a letter dated October 12, 2003, Dr. Wisner represented that “these medications are to reduce pain and inflammation and to promote circulation of his blood.”² According to Dr. Wisner, he carefully monitors these “mild drugs” and reports that Claimant has not displayed any “drug-seeking behavior.”³ In his opinion, without the medications, Claimant “experiences so much pain from the permanent cervical 5-6 and thoracic outlet injuries that he sustained, that he cannot function without them.”⁴ Therefore, Claimant requests reimbursement for the prescription medications Soma, Xanax, and Tylenol #3 and asked for mileage reimbursement to travel to Dr. Wisner's office

2 Ex. 1 at 11.

3 *Id.*

4 *Id.*

and to other towns for prescriptions.⁵

Claimant requested permission to change his treating physician to Dr. Wisner when Claimant's doctors in East Texas prescribed medications that made him sick. According to Claimant, Dr. Wisner diagnosed him as having a dislocated shoulder and a "nervous disorder" in his left shoulder. Under cross-examination, Claimant agreed he has had problems with alcohol and has used cocaine before, although he maintains he is not addicted to cocaine. He lives in Longview, but travels to Garland, Texas, 126 miles away (2 hours and 40 minutes each way) to see Dr. Wisner. Claimant argues that he could not find a doctor in Longview who did not want to give him medications that made him sick. Claimant also travels to Tyler, 40 miles away from Longview, to get his prescriptions filled, stating that he is in search of the best prices. Claimant denies he is addicted to the pain medications and represented that he only takes them when he has a "flare-up."

Claimant agrees he did not file his claim for reimbursement for these prescriptions with Carrier until 2003. Consequently, Carrier had no opportunity to issue any explanation of benefits (EOB). Claimant explained he did not know he could file claims for these prescriptions.

B. Legal Standards

Claimant has the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41. Pursuant to the Texas Workers' Compensation Act, 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 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. TEX. LAB. CODE ANN. § 408.021(a). Health care includes all reasonable and necessary medical, chiropractic, and physical therapy services. TEX. LAB. CODE ANN. § 401.011(19)(A).

C. Carrier's Position

Carrier first denied payment for these medications in March 1998 when Forte conducted a utilization review and determined the pain medications were not medically necessary to treat Claimant's condition. On October 20, 1999, Carrier documented that:

Carrier denies all treatment, disability and impairment as a result of psychiatric conditions, including but not limited to substance abuse and depression. Claimant's

⁵ The mileage claim was not presented to the Commission and was not made prior to the hearing. Claimant could not reference any authority to support his claim for mileage.

complaints of marital and family problems, deaths in the family, alcohol and narcotic abuse, recent arrest and legal problems are not the result of any activity occurring in the course & scope of employment for Tyler Pipe. Such conditions also are unrelated to the original injury or to any treatment thereof, and are ordinary diseases of life to which the general public is exposed. Carrier notes that claimant has received no prescription drugs in relation to work injury since 1998 and such [sic] played no part in his current complaints of substance abuse. There is no medical evidence to support the relation [sic] of psychiatric problems to work injury.⁶

On May 15, 2002, at the Carrier's request, Thomas S. Padgett, M.D., issued a letter after reviewing Claimant's medical records. According to Dr. Padgett, in December 1998, it was noted in an independent medical examination that Claimant was dependent on these pain medications and "if the claimant attempted to taper off medications he became agitated."⁷ Dr. Padgett opined that Claimant's Aongoing use of narcotic medication along with Xanax and Soma are not supported as being reasonable or necessary to treat the work related injury."⁸ Dr. Padgett noted that Tylenol #3, Xanax, and Soma have addictive properties.

Carrier presented the testimony of its expert, Samuel M. Bierner, M.D. Dr. Bierner reviewed Claimant's medical records and found no objective findings to support the use of these pain medications.⁹ According to Dr. Bierner, Claimant's shoulder snapped when he was injured, but the objective findings do not show that his left shoulder was dislocated. Claimant's surgeon diagnosed his condition as thoracic outlet syndrome, reflex sympathetic dystrophy, and causalgia.¹⁰ On November 28, 1995, Claimant underwent surgery which should have relieved the source of Claimant's pain.

Claimant later had an MRI taken that showed a lesion on the bone in his arm. Claimant was referred to a second surgeon on December 12, 1996, who recommended surgery. Claimant chose not to undergo the second surgery. When Claimant went to Dr. Wisner for treatment, Dr. Wisner diagnosed that Claimant had a dislocated shoulder. Dr. Bierner asserts that the medical records do not support this diagnosis. Dr. Bierner opines that Dr. Wisner has engaged in poor treatment for

9 Dr. Bierner testified that he reviewed Claimant's medical records admitted into evidence as Ex. A.

10 Ex. A at 89-90.

Claimant's pain complaints, particularly given Claimant's predisposition to addictive behavior.

The medical records include a psychologist's recommendation indicating that the pain medications being used were potentially addictive. The medical records show that Claimant abused alcohol to solve his pain problems.¹¹ According to Dr. Bierner, Soma is an addictive muscle relaxant, Xanax is an addictive anxiety medication, and Tylenol #3 (with codeine) is an addictive opiate analgesic. After being on the medications for six to seven years, Dr. Bierner opined, Claimant is probably physically dependent on these medications.

E. ALJ's Analysis

Claimant's compensable injury occurred on _____. Claimant underwent surgery in November 1995, which should have relieved his pain. Following the surgery, Claimant changed treating physicians to Dr. Wisner, who prescribed Soma, Xanax, and Tylenol #3, pain medications, to Claimant. All three are addictive. Although it was recommended to Claimant that he undergo a second surgery, he chose not to. Instead, for the past seven years, Claimant has used these pain medications and has become dependent upon them. The ALJ finds persuasive Dr. Bierner's testimony that the medical records provide no objective evidence to support Dr. Wisner's diagnosis of a dislocated shoulder. The ALJ is further persuaded by the medical record and Dr. Bierner's testimony that the use of Soma, Xanax, and Tylenol #3 are not medically necessary to treat Claimant's compensable injury.

While Claimant testified he is not addicted to these pain medications, his past behavior suggests otherwise. When Claimant quit taking the pain medications, he experienced a nervous disorder, loss of concentration, and an inability to work. Claimant then turned to alcohol to cope with his pain and loss of concentration. The evidence presented failed to show that Claimant's continued use of these addictive prescription medications is medically necessary to treat his compensable injury. Therefore, the ALJ denies Claimant's claim for reimbursement.

III. FINDINGS OF FACT

1. On _____, Claimant _____ sustained an injury to his left shoulder which is compensable under the Texas Workers' Compensation Act.

¹¹ Ex. A at 80.

2. At the time of the compensable injury, Claimant's employer had workers' compensation insurance coverage through TPCIGA for Reliance National Indemnity (Carrier).
3. In November 1995, Claimant was diagnosed with thoracic outlet syndrome, reflex sympathetic dystrophy, and causalgia and underwent surgery to relieve the pain in his left shoulder.
4. Claimant changed treating physicians to William Wisner, M.D. following the surgery.
5. In 1997 Claimant received a recommendation to undergo a second surgery to his left shoulder, which he elected not to undergo.
6. For the past seven years, Claimant has taken Soma, Xanax, and Tylenol # 3, all addictive medications.
7. Claimant has a history of alcohol abuse and has used cocaine on occasion.
8. When Claimant tried to quit taking the Soma, Xanax, and Tylenol #3, he experienced a nervous disorder, loss of concentration, and could not work.
9. Carrier denied coverage for the medications referred to in Finding of Fact No. 6 in March 1998 as not being medically necessary to treat the compensable injury.
10. Claimant began paying for the medications referred to in Finding of Fact No. 6 on his own when the Carrier stopped paying for them.
11. On November 23, 2003, Claimant filed a claim for medical dispute resolution requesting reimbursement of the medications referred to in Finding of Fact No. 6 provided between July 7, 2001, through October 20, 2003.
12. The Commission dismissed Claimant's appeal for being untimely filed and for failing to provide the documentation required by 28 TEX. ADMIN. CODE (TAC) ' 133.308(f).
13. Claimant timely appealed the Commission's decision.
14. On February 26, 2004, the Commission issued the notice of hearing, which stated the date, time, and location of the hearing and cited to the statutes and rules involved, along with a short, plain statement of the factual matters involved.
15. The medical record and evidence fails to show that the prescribed medications, Soma, Xanax, and Tylenol #3, were medically necessary to treat Claimant's compensable injury.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction over this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. § 413.031.

2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, 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. Claimant had the burden of proof in this proceeding. 28 TAC §§148.21(h) and (i); 1 TAC §155.41.
5. Claimant failed to timely file his claims from July 7, 2001, to November 24, 2002.
6. A health care provider is required to efficiently use and manage the health care provided to an injured worker. 28 TAC § 133.202(c)(2).
7. Based on the Findings of Fact Nos. 6-10 and 15, Claimant failed to show that the prescribed medications provided from November 25, 2002, through October 20, 2003, were medically necessary to treat his compensable injury as required under TEX. LAB. CODE ANN. §§ 401.011 and 408.021(a).
8. Based upon the foregoing Findings of Fact and Conclusions of Law, Claimant's request for reimbursement should be denied.

ORDER

IT IS THEREFORE, ORDERED that the Claimant's claim for reimbursement for prescribed medications, Soma, Xanax, and Tylenol #3, provided from July 7, 2001, through October 20, 2003, is denied.

SIGNED January 10, 2005.

**CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**