

**SOAH DOCKET NO. 453-04-7172.M5
TWCC MR NO. M5-04-1828-01**

VONO,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
LUMBERMENS UNDERWRITING	§	
ALLIANCE,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case is a dispute over whether Lumbermens Underwriting Alliance (Respondent) should reimburse VONO (Petitioner) the sum of \$520.71 for prescription medications provided to an injured worker (Claimant) from February 21, 2003, until May 23, 2003. The Administrative Law Judge (ALJ) concludes that Petitioner has not met its burden of proving that the Diazepam or Hydrocodone medications were medically necessary, but Petitioner has shown that the Skelaxin prescription was medically necessary. Therefore, Respondent should reimburse Petitioner for the cost of the Skelaxin prescribed during the period of disputed services.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

Administrative Law Judge (ALJ) Ami L. Larson conducted a hearing on February 14, 2005, at the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 West 15th Street, Austin, Texas. Petitioner appeared through its designated representative, Nicky Otts. Respondent appeared through its designated representative, Steven M. Tipton. The Commission Staff did not participate in the hearing.

The parties did not contest notice or jurisdiction. Therefore, those issues are set out in the Findings of Fact and Conclusions of Law below.

II. DISCUSSION

A. Introduction

On ____, Claimant sustained a neck injury while unloading a trailer at work. This injury was deemed to be work related and therefore compensable. At the time of the injury, Carrier was the workers' compensation insurer for Claimant's employer. Claimant has undergone two cervical surgeries and has been prescribed Hydrocodone/Apap, Diazepam, Skelaxin, Neurontin, and Amitriptyline by his treating physician, Bill Weldon, D.O.. These prescriptions were filled at Petitioner's pharmacy.

Carrier denied payment for the prescriptions filled between February 21, 2003 and May 23, 2003, based on their lack of medical necessity three years post-injury. Carrier relied on a peer review report for its determination.

Petitioner filed a timely Request for Medical Dispute Resolution. The Independent Review Organization (IRO) found that the Neurontin and Amitriptyline prescribed during the time period of disputed services were medically necessary¹, but agreed with Carrier that the Hydrocodone/Apap, Diazepam, and Skelaxin prescribed during this period were not.

On May 26, 2004, the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC), issued its Findings and Decision, which ruled that Petitioner was not entitled to reimbursement for the Hydrocodone/APAP, Diazepam, or Skelaxin dispensed from February 21, 2003 through May 23, 2003. On June 8, 2004, Petitioner filed a timely appeal of the TWCC denial of reimbursement for these three medications.

B. Legal Standards

Petitioner has the burden of proof in this proceeding.² Pursuant to the Texas Workers' Compensation Act (Act), an employee who has sustained a compensable injury is entitled to all 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.³ Health care includes all reasonable and necessary medical services.⁴ The IRO was authorized to hear the medical dispute in this case.⁵

C. Evidence and Argument

1. Petitioner

Petitioner is the dispensing pharmacy of the medications at issue. Petitioner submitted various records and two letters of medical necessity as Petitioner's Exhibits A and B respectively, both of which were admitted into evidence. Additionally, Petitioner called Rick Taylor, D.O. as a witness.

Petitioner relied upon two letters of medical necessity from Claimant's treating physician, Dr. Bill E. Weldon, D.O., dated May 29, 2002 and June 26, 2003, to support its claim that the three medications at issue were medically necessary.⁶ In the letter dated June 26, 2003, Dr. Weldon indicates that Claimant has undergone multiple cervical spinal fusion surgeries and has a current diagnosis of status post-cervical fusion and cervical radiculopathy. Dr. Weldon states that Claimant's symptoms include severe disabling pain and rigidity in his neck and upper extremities and that he is treated with prescription medication for relief of these symptoms. Regarding the

1 Carrier has since reimbursed Petitioner for these prescriptions and, therefore, they are not in dispute in this case.

2 28 TEX. ADMIN. CODE (TAC) §§ 148.21(h) and (i); 1 TAC § 155.41.

3 TEX. LAB. CODE ANN. § 408.021(a).

4 TEX. LAB. CODE ANN. § 401.011(19)(A).

5 28 TAC § 133.308.

6 Petitioner's Exhibit B.

medications at issue, Dr. Weldon indicates that he has prescribed Lortab (also known as Hydrocodone/APAP) for pain, Valium (also known as Diazepam) for severe musculoskeletal spasms, and Skelaxin for muscle spasms. Dr. Weldon indicates that these medications are routinely used for the purposes stated and that they are necessary to treat Claimant's symptoms.

In addition to the documentary evidence described above, Petitioner relied upon the testimony of Rick Taylor, D.O., who testified by telephone at the hearing. Dr. Taylor is a 1992 graduate of the Kirksville College of Osteopathic Medicine in Kirksville, Missouri. He is board certified in both family medicine and pain management and he owns and operates pain management clinics in east Texas.

Dr. Taylor testified that he reviewed all the documents contained in Petitioner's Exhibits A and B, as well as the entirety of Respondent's Exhibit A, but that he did not review any of Claimant's medical records or charts from the clinic(s) where Claimant received treatment. Dr. Taylor testified that Claimant had an anterior discectomy and interbody fusion, which means that he had two discs removed from front of his neck and replaced with solid bone to form a fusion.⁷ According to Dr. Taylor, Claimant has had two surgeries to fuse what is typically the maximum number of levels in the spine that can be fused. Dr. Taylor further indicated that a fairly significant percentage of such surgeries result in levels of pain that are greater than can be tolerated or treated by over-the-counter medications and that this appeared to be such a case.

With respect to the Diazepam⁸ prescription at issue in this case, Dr. Taylor testified that he "doesn't like to use Valium long-term and does not prescribe benzodiazepines long-term for anyone." Dr. Taylor went on to say, however, that "there are physicians who do and they aren't necessarily wrong in doing so."

Regarding the Hydrocodone⁹ prescription, Dr. Taylor testified that the amount of Hydrocodone prescribed for Claimant during the period of disputed services was reasonable for a patient with Claimant's type of injury and that there was no indication that Claimant was developing an addiction to this medication. Dr. Taylor disputed the statement made by the IRO physician that prolonged narcotic usage can easily lead to addiction in patients that have not responded to surgical management. Dr. Taylor testified that addiction occurs in less than 5% of patients who take opioids long term and that therefore, although addiction can occur in some cases, it is inaccurate to say, as the IRO did, that addiction is something that easily occurs.

With respect to the Skelaxin, Dr. Taylor testified that is routine to give non-narcotic muscle relaxants, such as Skelaxin, to certain patients on a long-term basis even though there is research that says they don't have any benefit. Dr. Taylor stated that, notwithstanding this research, many patients report long term benefit from using these types of medications.

⁷ Dr. Taylor testified that it was not clear to him, from the documents he reviewed, whether Claimant had a two-level fusion done in one surgery then had to have a subsequent "re-do" or whether one fusion was done separately from the other.

⁸ Also referred to as Valium.

⁹ Also referred to as Lortab.

Dr. Taylor testified that he did not know what, if any, non-opioid medications had been tried during the course of Claimant's treatment for his compensable injury. Dr. Taylor also stated that he was aware that some type of vocational rehabilitation was attempted during the course of Claimant's treatment, but that he did not know whether work conditioning or work hardening was included in this treatment and if it was not, it should have been. Dr. Taylor stated that Claimant underwent some injection therapy pre-surgery, but that he was not able to document any post-surgery physical medicine treatments other than some physical therapy that was referred to generally in the peer review report.

When asked whether he would adopt this course of treatment, *i.e.* prescribe the drugs at issue in the quantities prescribed, for a patient in his practice who presented with Claimant's post-surgical condition, Dr. Taylor responded by saying, "if the patient is not getting adequate pain control from physical therapy and non-opioid medications, absolutely the next step would be to consider opioids in controlled amounts such as was done here."

2. Respondent

Respondent disputes that the three medications at issue were medically necessary during the period of disputed services because Claimant did not show any improvement over the three-year period during which these medications were being prescribed. Respondent relies on both the peer review report and an IRO decision to support its position. Respondent also submitted, as evidence, several billing statements and a letter from Dr. M. Melissa Moon, dated July 6, 2004.

The peer review relied upon by Respondent was conducted on February 20, 2003,¹⁰ by Dr. Neal H. Blauzvern, D.O., who is fellowship trained in pain management, and board-certified in anesthesiology.¹¹ Dr. Blauzvern disputes that Claimant's pain is directly related to his compensable injury, and says that it is instead the result of a degenerative disease and two unsuccessful surgeries. Regardless of its origins, however, Dr. Blauzvern opines that because Claimant is not showing any benefit from the long-term use of narcotic medications, such medications should be discontinued.

The IRO report was completed on May 11, 2004, by an approved physician who is board-certified in the osteopathic board of neurology and is familiar with the condition and treatment issues in this appeal.¹² The IRO physician concluded the medications at issue were not medically necessary during the period of disputed services. The IRO physician indicated, as the basis for his conclusion, that muscle relaxers, such as Diazepam and Skelaxin, are not indicated for chronic pain from degenerative pathologies in the neck that have not responded to surgery and are not effective treatment for radicular pain. The IRO physician also indicated that prolonged narcotic usage has not been demonstrated to be beneficial for patients with chronic pain from degenerative spinal conditions and could easily lead to addiction in patients who have not responded to surgical management. The

10 Petitioner argued that because the peer review was completed prior to the period of disputed services, it was tantamount to an impermissible prospective denial of a non-preauthorization service. The ALJ rejects this argument and finds that the peer review, along with the other documents and testimony presented, is merely evidence, which may be given whatever weight is appropriate, as to the issue of medical necessity of the medications at issue during the period of disputed services.

¹¹ Respondent's Exhibit 1, pages 10-18.

¹² Petitioner's Exhibit A, pages 3-5 and Respondent's Exhibit A, pages 21-23.

IRO physician also noted that Claimant continued to complain of worsening symptoms despite the use of Hydrocodone/Apap for several months.

D. Analysis and Conclusion

1. Valium

There is no persuasive evidence in the record to support the medical necessity of the use of Valium during the period of disputed services from February 21, 2003 through May 23, 2003. Neither the peer review nor the IRO support the use of Valium during this time period; Claimant's treating physician, Dr. Weldon, states in his letters of medical necessity merely that he is prescribing Valium for muscle spasms, but does not indicate why this narcotic prescription is medically necessary especially in light of the fact that he is also prescribing Skelaxin for the same purpose;¹³ and even Petitioner's witness, Dr. Taylor, testified that he does not believe in the appropriateness of the long-term use of Valium and would not prescribe it long-term for anyone. During the period of disputed services, Claimant had already been receiving prescriptions for Valium for approximately one year without documented improvement. Petitioner has failed to meet his burden of proof to show that the Valium prescription was medically necessary between February 21, 2003 and May 23, 2003.

2. Skelaxin

There is conflicting evidence regarding the issue of whether Skelaxin was medically necessary during the period of disputed services. Dr. Weldon's letters of medical necessity describe the general characteristics of Skelaxin and state that it is being prescribed to Claimant for muscle spasms. Claimant had been taking Skelaxin for approximately one year prior to the period of disputed services without reported significant improvements. Nonetheless, the peer review report by Dr. Blauzvern dated February 20, 2003, indicates that the continued use of a non-narcotic muscle relaxant, such as Skelaxin, is appropriate for the treatment of muscle spasms, and Dr. Weldon indicates in his letter of medical necessity dated June 26, 2003, that a physical examination of Claimant two days prior revealed cervical spasms.

The IRO merely states that the use of muscle relaxers is not indicated for chronic pain from degenerative pathologies in the neck that have not responded to surgery and that muscle relaxers are not effective for treatment in radicular pain, but the IRO does not address whether Skelaxin is an appropriate or effective treatment for muscle spasms.

Given the fact that Dr. Weldon's physical examination of Claimant revealed muscle spasms present approximately one month after the period of disputed services, combined with the peer review recommendation for the "continued use of Skelaxin or another muscle relaxant (non-Benzodiazepine) for treatment of muscle spasms," the ALJ finds that the use of Skelaxin during the period of disputed services was medically necessary.

¹³ Dr. Weldon does state, in his letter of May, 29, 2002, that Claimant takes two muscle relaxants, "due to the extreme excessive muscle tension in his neck" but does not explain why these prescriptions are an effective or medically necessary treatment for Claimant's condition.

3. Hydrocodone

Petitioner has failed to prove that the use of Hydrocodone during the period of disputed services was medically necessary. Neither Dr. Weldon's letters of medical necessity nor Dr. Taylor's testimony show why Hydrocodone was medically necessary during the period of disputed services in light of the fact that Claimant had been taking Hydrocodone for approximately one year with little or no improvement noted. In fact, Dr. Weldon's letters make clear that the amount of Hydrocodone prescribed for Claimant actually increased between May, 2002 and June, 2003 with no improvement in Claimant's condition noted for either dose.

Petitioner's witness, Dr. Taylor, testified that it would be reasonable to consider using opioid medications (such as Hydrocodone/APAP) in controlled amounts for a patient who was not receiving adequate pain control from physical therapy and non-opioid medications, but Petitioner presented no evidence to show that any non-opioid medications had been tried. Petitioner presented no evidence to show that the Hydrocodone was helping Claimant, nor did it present any evidence to show that Claimant would suffer a decline in his condition if the Hydrocodone prescription were discontinued.

Additionally, the IRO indicated that prolonged narcotic usage has not been demonstrated to be beneficial for patients with chronic pain from degenerative spinal conditions. This observation is borne out by the fact that Claimant had been taking Hydrocodone for approximately one year by the time of the period of disputed services and had reported no improvement in his condition.

Dr. Blauzvern, in the peer review report, indicates that treatment of chronic pain by the use of a narcotic such as Hydrocodone would be appropriate, but only if there were clear evidence of significant clinical benefit and improved functioning. In this case, by the time of the period of disputed services, Claimant had been taking Hydrocodone for approximately one year without any demonstrated clinical benefit.

In conclusion, Petitioner failed to meet its burden of proof to show the medical necessity of the Valium or Hydrocodone prescriptions from February 21, 2003 through May 23, 2003, but Petitioner did show that the Skelaxin prescription was medically necessary during this same time period.

III. FINDINGS OF FACT

1. On ____, Claimant sustained a neck injury that was deemed work-related and compensable under the Texas Workers' Compensation Act (Act).
2. At the time of the compensable injury, Claimant's employer had workers' compensation insurance coverage with the Lumberman's Underwriting Alliance (Respondent).
3. Claimant's treating physician, Bill Weldon, D.O., prescribed Diazepam and Skelaxin for his muscle spasms and Hydrocodone/Apap for pain.
4. VONO (Petitioner) filled Claimant's drug prescriptions from February 21, 2003, through May 23, 2003.
5. Respondent denied reimbursement to Petitioner for the three prescriptions referred to in Finding of Fact No. 3 based upon a February 20, 2003 peer review completed by Neal H. Blauzvern, D.O..

6. Petitioner's appeal of the denial was considered by the Texas Workers' Compensation Commission's (Commission) Independent Review Organization (IRO).
7. The IRO's decision upheld Respondent's denial of reimbursement for the prescriptions referred to in Finding of Fact No. 3 on the basis that they were not medically necessary. Petitioner timely appealed that decision.
8. The Commission's notice of hearing dated July 8, 2004, stated the date, time, and location of the hearing and cited the statutes and rules involved along with a short, plain statement of the factual matters involved.
9. Petitioner and Respondent were represented at the hearing, but the Commission Staff chose not to participate.
10. Petitioner failed to present persuasive evidence to support the use of Valium, also known as Diazepam, to treat Claimant's muscle spasms.
11. By February 21, 2003, Claimant had been receiving Valium prescriptions for approximately one year and had not reported any significant improvement in his condition.
12. Petitioner failed to present evidence regarding what, if any, non-opioid medications were used in an effort to treat Claimant's pain.
13. Prolonged narcotic usage has not been demonstrated to be beneficial for patients with chronic pain from degenerative spinal conditions, such as that suffered by Claimant.
14. Claimant demonstrated no improved functioning or significant clinical benefit from his use of Hydrocodone/APAP over a period of approximately one year.
15. The use of a non-narcotic muscle relaxant, such as Skelaxin, is appropriate for the treatment of muscle spasms.
16. A physical exam of Claimant completed on June 24, 2003, revealed that Claimant suffered from cervical spasms.
17. Valium and Hydrocodone/APAP were not medically necessary for Claimant's compensable injury from February 21, 2003 through May 23, 2003.
18. Skelaxin was medically necessary to treat Claimant's muscle spasms from February 21, 2003 through May 23, 2003.
19. Claimant has undergone two spinal fusion surgeries since the time of his work-related injury, neither of which has significantly improved his functioning or pain levels.
20. Claimant has been generally diagnosed with status post-cervical fusion and cervical radiculopathy.

IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act (Act), TEX. LABOR CODE ANN. § 413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. The Independent Review Organization (IRO) was authorized to hear the medical dispute pursuant to 28 TEX.ADMIN. CODE § 133.308.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE ch. 148.
4. The request for a hearing was timely made pursuant to 28 TEX. ADMIN. CODE § 148.3.
5. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
6. Petitioner has the burden of proof in this matter. 28 TEX. ADMIN. CODE §§ 148.21(h) and (i); 1 TEX. ADMIN. CODE § 155.41.
7. Pursuant to the Act, an employee who has sustained 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).
8. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB.CODE ANN.§ 408.021(a).
9. Petitioner established, by a preponderance of the evidence, that the Skelaxin was medically reasonable and necessary under TEX. LABOR CODE ANN. §408.021(a).
10. Petitioner is entitled to reimbursement for the Skelaxin it dispensed to Claimant from February 21, 2003 through May 23, 2003.
11. Petitioner failed to establish, by a preponderance of the evidence, that the Hydrocodone/APAP, also called Lortab, or the Diazepam, also called Valium, were medically necessary medically reasonable and necessary under TEX. LABOR CODE ANN. §408.021(a).
12. Petitioner is not entitled to reimbursement for the Hydrocodone/APAP or the Diazepam dispensed to Claimant from February 21, 2003 through May 23, 2003.

ORDER

THEREFORE IT IS ORDERED that Lumbermens Underwriting Alliance reimburse VONO the sum of \$201.34 plus applicable interest for the Skelaxin provided to Claimant between February 21, 2003 and May 23, 2003.

FURTHER, IT IS ORDERED that VONO's request that Lumberman's Underwriting Alliance be ordered to pay for Hydrocodone/APAP and Valium provided to Claimant between February 21, 2003 and May 23, 2003 be, and the same is hereby, denied.

SIGNED April 1, 2005.

**AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**