

<b>HIGHPOINT PHARMACY,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>LIBERTY MUTUAL FIRE INSURANCE</b>	§	
<b>COMPANY,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	§	

**DECISION AND ORDER**

Highpoint Pharmacy (Petitioner) appealed the findings and decision of the Texas Department of Insurance, Division of Worker’s Compensation’s (Department’s) designee, an independent review organization (IRO), which found that prescriptions that Petitioner provided a workers’ compensation claimant (Claimant) were not medically necessary healthcare. The IRO’s decision upheld a denial of reimbursement by the Liberty Mutual Fire Insurance Company (Carrier). This decision and order finds the prescriptions, with the exception of Nexium, were not shown to be medically necessary for Claimant.

**I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

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

The hearing in this matter convened and the record closed December 15, 2005, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Bill Zukauckas. Petitioner was represented by its employee, Nicky Otts. Attorney Kevin Franta represented Respondent.

## II. DISCUSSION

### A. Factual Background

Claimant sustained a compensable injury to his back on\_\_\_\_, when he slipped on antifreeze and fell on his buttocks. At the time of the injury, Carrier was the workers' compensation insurer for Claimant's employer. Subsequent to the compensable fall, Claimant developed a worsening back pain and bilateral lower extremity pain. Claimant also had L4-L5 posterior lumbar interbody fusion performed in 1993, unrelated to his compensable injury.

Following his compensable injury on\_\_\_\_, Claimant was treated with analgesic medications, physical therapy, epidural steroid injections, and facet injections. When conservative treatments failed, Claimant underwent bilateral L5-S1 decompressive hemilaminectomies, left and right L5-S1 foraminotomies, posterior lumbar interbody fusion at L5-S1 with autograft bone, instrumentation and placement of cages. These surgeries were performed by Jacob Rosenstein, M.D., Claimant's treating doctor for this injury on \_\_\_\_.

Following the 1997 surgeries, Claimant continued to suffer from chronic severe back pain. He has undergone numerous modalities including physical therapy, chiropractic manipulations, TENS unit, lumbar epidural steroid injections, facets injections, Botox injections, trigger point injections, and oral medications including Medrol, Skelaxin, Vioxx, Zanaflex, Topamax, Zoloft, Neurontin, Theragesic, Tramadol, Omeprazole, Nexium, and Orphenadrine. None of the treatments have provided long-term relief.

The medications in dispute are Theragesic, Orphenadrine, Bextra, and Nexium, at a total cost of \$698.56, and they were prescribed for dates of services between April 17 and June 30, 2003. Carrier denied payment for the prescriptions based on the lack of medical necessity. The IRO reviewer upheld the denial, writing:

[Claimant] has had extensive treatments for his chronic pain with no indication of sustained benefit. The continued long term use of muscle relaxers (Orphenadrine) is not supported based upon evidence based reviews. Muscle relaxers may be beneficial for relieving acute pain; however, effectiveness tends to decrease over time. Also, combination of a muscle relaxer and NSAID has not been shown to offer additional pain reduction. Since long-term NSAID use in chronic low back pain is not supported, use of Nexium to counteract NSAID-related dyspepsia is not medically necessary as it relates to this injury.

Petitioner timely appealed the denial.

**B. Legal Standards**

Petitioner has the burden of proof in this proceeding. 28 TEX. ADMIN. CODE (TAC) §§ 148.21(h) and (i); 1 TAC § 155.41. Pursuant to the Texas Worker's Compensation Act (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). Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A). The IRO was authorized to hear the medical dispute pursuant to 28 TAC §133.308.

**C. Evidence and Argument**

Both Petitioner and Carrier proffered the records they submitted to the IRO and some additional records. (Exs. A, B, and C).

**1. Petitioner's Case**

Dr. Rosenstein diagnosed Claimant with incurable chronic pain syndrome and has tried all sorts of treatment and medications to help Claimant relieve his pain. The medications at issue were simply four of the many he has prescribed to treat Claimant.

In his letter of medical necessity dated August 6, 2003, Dr. Rosenstein wrote that he prescribed Claimant Orphenadrine for his muscle spasms, which he alternates with Skelaxin and Methylprednisolone, which he prescribes for acute exacerbation of Claimant's pain. In that letter, he also noted that he prescribed Nexium for GI problems related to his medications. In a letter of medical necessity dated December 10, 2003, Dr. Rosenstein stated that he prescribed Bextra, a non-steroidal anti inflammatory (NSAID) for moderate to severely moderate back pain. He stated that the three drugs were reasonable and medically necessary to treat Claimant's work-related injury.

Petitioner's had no expert witnesses in this case.

## **2. Carrier's Case**

Carrier presented Neal Blauzvern, D.O., to testify as an expert witness on its behalf. Dr. Blauzvern testified that he provides full-time pain management to patients five days a week/ eight hours a day. Dr. Blauzvern testified that he believes the documentation fails to support the need for any of the medications Dr. Rosenstein is prescribing. For instance, he argued, and Provider conceded, there is no documentation of muscle spasms in Claimant in any of Dr. Rosenstein's chart notes. Dr. Blauzvern testified that a muscle relaxant like Orphenadrine cannot ever be medically necessary in the absence of muscle spasms. With regard to the Theragesic topical cream, Dr. Blauzvern testified that it is only used for pains that occur at skin level and would never be helpful for Claimant's deep back spinal pains. With regard to Nexium, used to treat Claimant's GI distress, Dr. Blauzvern testified that Claimant showed symptoms of gastroesophageal reflux disease or GERD in 1993 that caused his GI upsets even before his compensable injury in\_\_\_\_. Dr. Blauzvern believed the Nexium is protecting a pre-existing GI system problem from medications that are unnecessary. Consequently, he stated the Nexium is unnecessary to treat the compensable injury.

### **D. Analysis**

Petitioner failed to meet its burden of proof for each medication, with the exception of the Nexium. Dr. Rosenstein's letters of medical necessity contained mostly conclusory statements that the prescriptions were necessary and no expert testimony was offered by Petitioner.

While it may be that Dr. Rosenstein had evaluated Claimant's clinical picture and found legitimate reasons to maintain him on NSAID and muscle relaxers, those reasons are not evident from the record, and Petitioner's argument is not a valid substitute for a reasoned explanation from Dr. Rosenstein or some other expert. Dr. Brauzvern was persuasive that the medical records made no mention of muscle spasms in Claimant's back. The only evidence in the record on the efficacy of muscle relaxants came from Dr. Blauzvern, who testified that in the absence of muscle spasms, muscle relaxants would play no role in Claimant's pain treatment. Dr. Blauzvern was also persuasive that the Theragesic cream would be of no help for Claimant's deep spinal pain. Dr. Blauzvern was persuasive, also, in his testimony that Orphenadrine, a NSAID, was not documented to be effective for Claimant's pain relief.

While the ALJ agrees with Dr. Blauzvern that it may be that Claimant's preexisting GERD might be the cause of the GI distress causing the need for Nexium, the ALJ is more clear from Dr. Rosenstein's records that Claimant was experiencing GI distress from medications. Consequently, the ALJ finds in favor of the Provider that the Nexium is medically necessary for the date of service in question, even though the medications that may have caused the GI distress have not been shown to be medically necessary.

Petitioner failed to establish that the prescriptions, with the exception of the Nexium, were medically necessary healthcare, and it is not entitled to reimbursement from Carrier for those drugs.

### **III. FINDINGS OF FACT**

1. In\_\_, Claimant sustained injuries to his back that were compensable under the Texas Workers' Compensation Act (Act).
2. At the time of the compensable injuries, Claimant's employer had workers' compensation insurance coverage with Liberty Mutual Fire Insurance Company (Carrier).
3. In 2003, Claimant's treating physician, Jacob Rosenstein, M. D., prescribed Theragesic, Orphenadrine, Bextra, and Nexium for Claimant's compensable injury.
4. Highpoint Pharmacy (Petitioner) filled Claimant's drug prescriptions for Theragesic, Orphenadrine, Bextra, and Nexium between April 17 and June 30, 2003.
5. Carrier denied reimbursement to Petitioner for the prescriptions based on the lack of medical necessity.
6. Petitioner's appeal of the denial was considered by the Texas Department of Insurance, Division of Worker's Compensation's (Department's) designee, an Independent Review Organization (IRO).
7. The IRO's decision upheld Carrier's denial of reimbursement on the basis that the prescriptions were not medically necessary. Petitioner appealed that decision within the required time.
8. The Commission Staff sent notice of hearing to the parties that stated the date, time, and location of the hearing and cited to the legal statutes and rules involved along with a short, plain statement of the factual matters involved.
9. The disputed prescriptions were to treat Claimant's complaints of chronic pain in his back and potentially associated gastrointestinal problems.
10. Claimant's treating doctor failed to document that Claimant was experiencing back spasms.
11. No evidence was presented showing that the muscle relaxing medication like Orphenadrine had any medical use for Claimant's compensable injury in the absence of back spasms.

12. No evidence was presented documenting the efficacy of a non-steroidal anti-inflammatory (NSAID) like Bextra.
13. No evidence was presented documenting the efficacy of the surface pain relieving creme Theragesic.
14. Petitioner did adequately document that Nexium was prescribed to treat gastrointestinal problems potentially associated with medications used to treat his compensable injury.
15. Theragesic, Orphenadrine, and Bextra were not shown to be medically necessary for Claimant's compensable injuries when dispensed by Petitioner from April 17 and June 30, 2003.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Department of Insurance, Division of Workers' Compensation (Department) 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(d) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The IRO was authorized to hear the medical dispute pursuant to 28 TEX. ADMIN. CODE (TAC) § 133.308.
4. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TAC §133.308.
5. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
6. Petitioner had the burden of proof in this proceeding. 28 TAC §§148.21(h) and (i); 1 TAC § 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)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN.§ 401.011(31).
9. Petitioner is not entitled to reimbursement for the Theragesic, Orphenadrine, and Bextra it

dispensed to Claimant between April 17 and June 30, 2003, because those drugs were not shown to be reasonable or medically necessary healthcare for him.

10. Petitioner is entitled to reimbursement for the Nexium it dispensed to Claimant on June 12, 2003, because that drug was shown to be reasonable and medically necessary healthcare for him.

### **ORDER**

**It is ORDERED** that Highpoint Pharmacy is entitled to reimbursement in the amount of \$149.89 by Liberty Mutual Fire Insurance Company for the Nexium it dispensed to Claimant on

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**SIGNED February 8, 2006.**

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**BILL ZUKAUCKAS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**