

**SOAH DOCKET NO. 453-05-6701.P1**

<b>AMERICAN HOME</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>ASSURANCE</b>	§	
<b>COMPANY,</b>	§	
<b>Petitioner</b>	§	
<b>v.</b>	§	<b>OF</b>
<b>TEXAS DEPARTMENT OF</b>	§	
<b>INSURANCE, DIVISION OF</b>	§	
<b>WORKERS' COMPENSATION AND</b>	§	
<b>JACOB ROSENSTEIN, M.D.,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondents</b>		

**DECISION AND ORDER**

American Home Assurance Company (Carrier) challenges a medical interlocutory order (MIO) issued by the Texas Workers' Compensation Commission, now the Texas Department of Insurance, Division of Workers' Compensation (Division), requiring it to pay for an office visit, an injection, and five medications over a three-month period. This decision concludes that the office visit, injection, and the medications were medically necessary.

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

The MIO was issued on May 5, 2005, pursuant to the Division's Prospective Review of Medical Examination (PRME) rules at 28 TEX. ADMIN. CODE (TAC) §133.650. The Carrier filed a timely hearing request. After proper and timely notice, the hearing convened and closed on May 14, 2007, at the State Office of Administrative Hearings (SOAH), with the undersigned Administrative Law Judge (ALJ) presiding. The Carrier and the Division were represented by counsel, who appeared in person. Jacob Rosenstein, M.D., participated *pro se*, by telephone.

SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§402.073(b) and 413.055 and TEX. GOV'T CODE ANN. ch. 2003.

## II. DISCUSSION

### A. Background

The injured worker (Claimant) is a \_\_\_\_\_ with \_\_\_\_\_. On \_\_\_\_\_, she injured herself while attempting to remove a soda insert. While twisting to get the insert out, she felt a burning sensation in the mid-lumbar spine with radiating pain to the low back area. She was referred to Dr. Rosenstein for a neurological evaluation. After an MRI scan and evaluation, Dr. Rosenstein determined that Claimant had left lumbar radiculopathy, left cervical radiculopathy, neck pain, multi-level degenerative lumbar disc disease from T12-L1 down to L5-S1 with disc space narrowing at all levels except L4-5, possible L5-S1 disc protrusion, and left trochanteric bursitis.

Claimant participated in conservative care for a period of time. When the conservative care no longer benefitted Claimant, Dr. Rosenstein performed lumbar surgery for the prominent symptoms and findings at L5-S1 on October 26, 2001. Claimant returned to Dr. Rosenstein in September of 2002. At that time, a lumbar CT scan was performed, showing loosening of the intervertebral fusion cages, suggestive of non-union. On December 10, 2002, Dr. Rosenstein performed a repeat fusion, using a lateral gutter fusion as well as posterior instrumentation with pedicle screws. Dr. Rosenstein continued to see Claimant after the second surgery. As part of her recovery, Dr. Rosenstein prescribed trigger point injections and various medications to assist her in recovery. Eventually, the fusion was determined to be successful. Claimant, however, continued to complain of pain in the lower back, left hip, right hip, and neck.

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides: "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: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment." Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

The Carrier has the burden of proof in this proceeding.<sup>1</sup>

The disputed services include an office visit, a trigger point injection, and prescriptions for Hydrocodone, Carisoprodol, Bextra, Buspirone, and Neurontin (collectively, medications) from May 4, 2005, through August 2, 2005.

## **B. Evidence and Analysis**

The ALJ concludes that the medications, the injection, and office visit were medically necessary to treat the compensable injury. At the hearing, both parties offered various medical records in evidence. Dr. Rosenstein testified on behalf of Respondents. Although Carrier had the burden of proof, it did not offer any witness testimony. Instead, it relied on three medical reports: Gary Hutchison, M.D. (Carrier Ex. 1), Hans Wendenburg, M.D. (Carrier Ex. 2), and George Armstrong, M.D. (Carrier Ex. 3).<sup>2</sup>

The ALJ assigned very little weight to Dr Hutchison's and Dr. Wendenburg's reports. These reports were written in 2003 and did not address all the medications at issue in this case. Furthermore, neither doctor examined Claimant but relied solely on medical records. In addition, both reports were completed within the year following Claimant's second fusion surgery in December 2002. Dr Rosenstein testified that, at a minimum, Claimant would need at least a full year to recover from her second fusion surgery. This testimony was not rebutted by the Carrier.

Although Dr. Armstrong saw Claimant one time, his report also relied heavily on prior medical records. At the time of the visit, Claimant complained of constant pain in her lower back,

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<sup>1</sup> TEX. LAB. CODE ANN. §413.055, 28 TEX. ADMIN. CODE (TAC) §148.14(a).

<sup>2</sup> Carrier mostly relied on Dr. Armstrong's report.

left hip, right hip, and neck. On the day of the visit, she rated her pain 6 out of a possible 10. Of the five medications in dispute, Dr. Armstrong seemed most concerned about Hydrocodone because it is addictive. He recommended continued use of Bextra to treat Claimant's multi-level degenerative disc disease but not to treat her compensable injury, which he believed required no further treatment. He also recommended use of Buspirone because of Claimant's depression as a result of her injury. Although Dr. Armstrong did not recommend use of Carisoprodol or Neurontin, he did not adequately explain why. Finally, Dr. Armstrong recommended over-the-counter Tylenol, instead of Hydrocodone, for Claimant's pain.

Based on the three medical reports relied on by Carrier, the ALJ finds that the Carrier did not meet its burden of proof. Dr. Rosenstein testified and provided sufficient testimony showing that the medications, the office visit, and the trigger point injection were medically necessary for this Claimant. In July 2000, Claimant suffered a severe injury impacting her back and neck. Although Claimant had degenerative disc disease, the injury exacerbated her condition. Claimant attempted conservative care, but a lumbar fusion was needed in October 2001. Because the first fusion was not successful, Dr. Rosenstein performed a second fusion on December 10, 2002. Claimant required at least a full year to recover from the second fusion. Even in 2003 and 2004, Claimant was complaining of constant pain. For example, on May 4, 2004, Claimant rated her low back pain as 4 to 6 and constant. She rated her neck pain at 7 and constant. She further indicated that she takes the Hydrocodone for extreme pain, but she also stated she is trying to wean herself off Hydrocodone.<sup>3</sup> Even in 2005, Claimant complained of back pain as high as 8 out of 10.<sup>4</sup>

The evidence shows that between May 4, 2005, and August 2, 2005, Hydrocodone, Carisoprodol, Bextra, Buspirone, and Neurontin were medically necessary to treat Claimant's compensable injury. Hydrocodone treated Claimant's pain; Carisoprodol, a muscle relaxant, treated back spasms that she was having in May 2005; Bextra, an anti-inflammatory, treated residual pain inflammation caused by the compensable injury; Buspirone treated Claimant's depression and anxiety associated with her injury; and Neurontin treated Claimant's pain associated with her lumbar

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<sup>3</sup> DWC Ex. 51.

<sup>4</sup> DWC Ex. 55.

radiculopathy. The trigger point injection was medically necessary to treat Claimant's pain associated with her muscle spasms. In addition, the office visit made in conjunction with the trigger point injection was also medically necessary. Shortly after Claimant received the trigger point injection in June 2005, her pain began to diminish substantially. By September 2005, she was off her medications. Furthermore, in September 2005, Claimant was given notification that she could return to work without restrictions.

### III. FINDINGS OF FACT

1. The injured worker (Claimant), a \_\_\_ with \_\_\_, was injured on \_\_\_, while attempting to remove a soda insert. While twisting to get the insert out, she felt a burning sensation in the mid-lumbar spine with radiating pain to the low back area.
2. Claimant was referred to Jacob Rosenstein, M.D., for a neurological evaluation.
3. After an MRI scan and evaluation, Dr. Rosenstein determined that Claimant had left lumbar radiculopathy, left cervical radiculopathy, neck pain, multi-level degenerative lumbar disc disease from T12-L1 down to L5-S1 with disc space narrowing at all levels except L4-5, possible L5-S1 disc protrusion, and left trochanteric bursitis.
4. Claimant participated in conservative care for a substantial period of time.
5. When the conservative care no longer benefited Claimant, Dr. Rosenstein performed lumbar surgery for the prominent symptoms and findings at L5-S1 on October 26, 2001.
6. In September 2002, a lumbar CT scan was performed, showing loosening of the intervertebral fusion cages, suggestive of non-union.
7. On December 10, 2002, Dr. Rosenstein performed a repeat fusion, using a lateral gutter fusion as well as posterior instrumentation with pedicle screws.
8. Dr. Rosenstein continued to see Claimant after the second surgery.
9. As part of her recovery, Dr. Rosenstein prescribed trigger point injections and various medications to assist her in recovery.
10. Eventually, the fusion was determined to be successful.
11. Claimant continued to complain of significant pain in the lower back, left hip, right hip, and neck.

12. To treat Claimant's pain and other symptoms, Dr. Rosenstein prescribed five medications between May 4, 2005, and August 2, 2005: Hydrocodone, Carisoprodol, Bextra, Buspirone, and Neurontin (collectively, medications).
13. Dr. Rosenstein prescribed a trigger point injection for Claimant's pain. There was also an office visit associated with the trigger point injection.
14. Claimant's employer's workers' compensation insurance carrier, American Home Assurance Company (Carrier), denied Dr. Rosenstein's request to provide the disputed services.
15. Dr. Rosenstein submitted a Request for Prospective Review of Medical Care Not Requiring Preauthorization, asking that the Texas Workers' Compensation Commission (Commission) order the disputed services to be provided.

16. The Commission appointed Gerarado Florez, M.D., as the Prospective Review of Medical Examination (PRME) doctor.
17. On April 20, 2005, Dr. Florez opined that the requested services were medically necessary.
18. On May 4, 2005, the Commission issued a medical interlocutory order (MIO) directing the Carrier to pay for the disputed services.
19. The Carrier requested a hearing not more than 20 days after receiving notice of the MIO.
20. All parties received not less than 10 days notice of the hearing that contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
21. After proper and timely notice, the hearing convened on May 14, 2007, at the State Office of Administrative Hearings (SOAH), with the Administrative Law Judge Michael J. O'Malley presiding. The Carrier was represented by John V. Fundis, and the Division was represented by Peter Mills. Dr. Rosenstein participated *pro se*, by telephone.
22. Claimant continued to have chronic neck and back pain several years after the second fusion surgery on December 10, 2002.
23. Hydrocodone helped relieve Claimant's pain.
24. Hydrocodone was reasonably required by Claimant's chronic pain that resulted from her compensable injury.
25. Depression is typically associated with chronic pain.
26. The Claimant suffered from depression associated with her chronic pain.
27. Buspirone treats depression.
28. Buspirone is reasonably required in treating Claimant's depression associated with her chronic pain from her compensable injury.
29. Carisoprodol was a muscle relaxant that Claimant needed to treat her back spasms associated with her compensable injury.
30. Bextra, an anti-inflammatory, was necessary to treat Claimant's residual pain inflammation associated with her compensable injury.
31. Neurontin was necessary to treat Claimant's pain associated with her lumbar radiculopathy.

32. The trigger point injection was necessary to treat Claimant's pain associated with her muscle spasms.
33. The office visit was necessary prior to her trigger point injections and to monitor Claimant's condition and use of medications.

#### **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 TEX. LAB. CODE ANN. §§402.073(b) and 413.055 and TEX. GOV'T CODE ANN. ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
3. The Carrier had the burden of proof in this proceeding, and it failed to meet that burden. TEX. LAB. CODE ANN. §413.055, 28 TEX. ADMIN. CODE (TAC) §148.14(a).
4. The office visit, the trigger point injection, and the prescriptions for Hydrocodone, Carisoprodol, Bextra, Buspirone, and Neurontin were medically necessary to treat the Claimant's compensable injury. TEX. LAB. CODE ANN. §408.021.

#### **ORDER**

**IT IS THEREFORE, ORDERED** that the office visit, the trigger point injection, and the prescriptions for Hydrocodone, Carisoprodol, Bextra, Buspirone, and Neurontin between May 4, 2005, and August 2, 2005, were medically necessary to treat the Claimant's compensable injury and that American Home Assurance Company is ineligible for reimbursement for payments for those services and medications.

**SIGNED June 20, 2007.**

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**MICHAEL J. O'MALLEY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**