

**SOAH DOCKET NO. 454-06-0899.P1**  
**TDI-DWC FILE NO. \_\_\_\_**

<b>HARRIS COUNTY,</b>	§	<b>BEFORE THE STATE OFFICE</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>KENNETH MARK ALO', M. D.,</b>	§	
<b>Respondents</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Harris County (Carrier), a self-insured government entity, contested a medical interlocutory order (MIO) issued by the Texas Department of Insurance, Division of Workers' Compensation (Division). The MIO required Carrier to pay for certain medications found to be medically necessary for the last three months of 2005 to treat a claimant's \_\_\_ hip injury. The MIO ordered payment on the basis of a Prospective Review Medical Examination (PRME). Kenneth Mark Alo', M. D. (Respondent), was the prescribing doctor. On appeal, the Carrier asserted that the MIO decision was incorrect and sought authority to seek reimbursement from the subsequent injury fund for payments it made for the medications.

The hearing in this matter convened on May 18, 2007, in Austin, Texas, with Administrative Law Judge (ALJ) Cassandra J. Church presiding. The record closed that day. Attorney Mark H. Sickles represented Carrier, Assistant General Counsel Alyssa Long represented the Division, and Attorney Jeffrey L. Scott represented Respondent. Notice was proper and jurisdiction was established in this case.

The ALJ concluded that Carrier established by a preponderance of the credible evidence that the MIO's determination that the medications were necessary to treat Claimant's compensable injury

was incorrect and that Carrier should be authorized to seek reimbursement from the subsequent injury fund. This Decision and Order makes no findings as to whether Carrier otherwise qualifies for such reimbursement.<sup>1</sup>

## I. DISCUSSION

### A. Applicable Law and Burden of Proof

This case is governed by the Texas Workers' Compensation Act (the Act).<sup>2</sup> The workers' compensation insurance scheme created by the Act covers all medically necessary health care, including all reasonable medical aid, examinations, treatments, diagnoses, evaluations, and services reasonably required by the nature of the compensable injury and reasonably intended to cure or relieve the effects naturally resulting from a compensable injury.<sup>3</sup>

As the party requesting a hearing before the State Office of Administrative Hearings (SOAH), Carrier has the burden of proof. That burden of proof is by preponderance of the evidence. SOAH has considered and ruled on the issue of the standard of proof in a previous case; the ALJ concludes the same reasoning applies here so adopts the ruling in that case.<sup>4</sup>

### B. History of the Case and Evidence

---

<sup>1</sup> The PRME process requires that the Carrier pay for the treatment ordered by the MIO and then seek reimbursement from the subsequent injury fund, after contested-case hearing. Respondent prescribed the medications, but there is nothing in the record to suggest that he dispensed them. Presumably, Carrier paid the dispensing pharmacy once the MIO was issued.

<sup>2</sup> TEX. LAB. CODE ANN. § 401.001, *et seq.*

<sup>3</sup> TEX. LAB. CODE ANN. § 401.011(19) and (31).

<sup>4</sup> *See* SOAH Docket No. 453-04-5005.P1, Order No. 2 (2005).

On\_\_\_\_\_ (Claimant) injured her right hip in a fall from a chair or stool, suffering what was variously described as a bone contusion or lumbar strain.<sup>5</sup> Claimant was treated conservatively with physical therapy, work hardening, massage therapy, ultrasound, and injections.<sup>6</sup> In\_\_\_\_, Claimant suffered a subsequent work-related injury to her right knee which was treated surgically, by an arthroscopic procedure, an arthroplasty, in May 1996.<sup>7</sup> Claimant continued to suffer pain in subsequent years and was eventually diagnosed as having chronic pain syndrome. In February 2006, she underwent a replacement of her right knee.<sup>8</sup>

Respondent had been Claimant's pain management doctor since February 2004. In late 2005, he prescribed several medications for management of her pain: Duragesic patches (100 mg.), a continuous-release opiate pain medication; Zoloft (50 mg.), an anti-depressant; Sonata (10 mg.), a sleep medication; and, Lorazepam (0.5 mg), an anti-anxiety medication.

On November 18, 2005, Prisco T. Evangelisa, M. D., performed a PRME and concluded these medications were necessary to treat Claimant for the hip injury. Although Claimant's subsequent knee

---

<sup>5</sup> Carrier Exh. 1, pp. 19-29.

<sup>6</sup> Carrier Exh. 1, pp. 1-5.

<sup>7</sup> Carrier Exh. 1, pp. 12-13.

<sup>8</sup> Carrier Exh. 1, p. 20.

injury was also a compensable, work-related injury, Respondent's request for reimbursement and PRME consideration was based solely on the \_\_\_hip injury. That is the only injury the PRME reviewer considered, so is the only one at issue here.

Claimant was working full time through October 2005 and was capable of doing so, at the sedentary level.<sup>9</sup> In November 2005, she was not working although she was able to drive an automobile.<sup>10</sup> In 2005, Claimant was 63 years of age.

In various examinations between May 1996 and September 2005, Claimant showed increasingly-severe signs of skeletal degeneration including degenerative spur formation, facet osteoarthritis, a disk protrusion, and peripheral degenerative joint disease.<sup>11</sup> By October 2005, Claimant had developed multi-level disc degeneration and moderate osteoarthritis of her left hip, not the one injured in 1995.<sup>12</sup> In October 2005, Andrew Kant, M. D., examined Claimant in connection with her reports of low back pain and left shoulder pain, including evaluation of X-rays. He noted that

---

<sup>9</sup> Carrier Exh. 1, p. 2.

<sup>10</sup> Carrier Exh. 1, p. 1.

<sup>11</sup> Carrier Exh. 1, pp. 2 and 12.

<sup>12</sup> Carrier Exh. 1, pp. 141-144.

certain movements of her knee caused pain but that she had full range of motion in her knees, hips, and ankles. Dr. Kant recommended continued use of medication for management of her ongoing pain.

Carrier contended that the medications were not necessary to treat Claimant's hip injury. Carrier's expert witness, Charles Robert Crane, M. D., a pain management and rehabilitation specialist, stated that he was unable to discern in Claimant's recent medical records any indications of periodic review by objective measures of the effectiveness of the medication regimen. He stated that in pain management cases, particularly those using medications as part of the treatment, objective documentation was necessary to demonstrate the continued need for particular medications and the appropriate dosage for any medications. He said the use of opiate pain medications for non-malignant pain required periodic testing for effects of the medication on the patient's general health, the level of the narcotic in the patient's system, and also an evaluation of its effects in connection with other substances being taken by the patient.

In addition to Dr. Crane's evaluation, Carrier also offered notes on two examinations performed by Jeremiah J. Twomey, M. D. On November 9, 2005, Dr. Twomey concluded that Claimant demonstrated symptoms of a chronic pain syndrome, including depression, but that her hip injury had resolved. Dr. Twomey ascribed her pain to conditions of life, particularly widespread spondylosis and peripheral degenerative joint disease.<sup>13</sup> Dr. Twomey had also examined Claimant in August 2004 and concluded that there were no residual symptoms from the hip injury that had occurred about 10 years before his examination.

Respondent is board certified in pain management and anaesthesiology. Respondent stated the medications reduced Claimant's pain to manageable levels and helped her sleep. He stated the anti-anxiety medication helped relax Claimant's muscle spasms and that Claimant was consistent in

---

<sup>13</sup> Carrier Exh. 1, pp. 10-14.

her reports of pain during the period he treated her. Respondent stated that he observed her movements and behavior during his examinations in order to compare her functioning with her self-reported high pain levels. Respondent stated that he had concluded that her skeletal degeneration had been accelerated by the trauma she suffered in \_\_\_\_, and that pain at the levels reported by Claimant were possible from degenerative changes in the joints and bones, although not probable. Respondent did not refill the Duragesic prescription in 2006.

### **C. Analysis**

The only issue in this case is whether this treatment was reasonably required by the nature of the compensable injury to her right hip.

Carrier established by credible evidence that the treatment was not medically necessary to treat the \_\_\_ injury. In the years since that hip injury, Claimant had experienced a serious knee injury as well as exhibiting a variety of severe degenerative changes to her spine and peripheral joints. Although Respondent opined that the hip injury had accelerated the development of her other conditions, Respondent did not explain the mechanism by which a sprain or bone contusion in \_\_\_ blossomed into conditions throughout her skeletal system 10 years later. Dr. Twomey concluded that the symptoms from the initial fall had resolved long before the end of 2005 and that her other conditions, including her right knee, were the sources of Respondent's continuing pain. The ALJ found Dr. Twomey's analysis of Claimant's injury credible and well-supported by the results of X-ray taken of Claimant skeletal system in the years between 1995 and 2005. Further, Claimant's primary complaints of pain, for which she saw Dr. Kant in October 2005, were low back and left shoulder pain. She had full range of motion of her hips.

The medical reports, coupled with Dr. Crane's testimony concerning the absence of appropriate objective evaluation of the effectiveness of the medications prescribed in late 2005 for Claimant, support the conclusion these medications were not necessary to treat the \_\_\_ injury.

In sum, the ALJ concluded that the greater weight of the credible medical evidence in this case supported Carrier's position, that the PRME doctor decided wrongly that the medications prescribed by Respondent were medically necessary to treat Claimant's \_\_\_ hip injury, so the MIO based on that determination was in error.

#### **D. Summary**

As Carrier met its burden of proof to show that the medications prescribed by Respondent were not necessary to treat Claimant's \_\_\_ compensable injury, it is entitled to seek reimbursement from the subsequent injury fund for any payments it made to Respondent, or to the dispensing pharmacy, under the mandate of the MIO.

### **II. FINDINGS OF FACT**

1. On \_\_\_(Claimant) injured her right hip in a fall from a chair or stool. She suffered a bone contusion or lumbar strain.
2. Claimant's hip injury was treated conservatively with physical therapy, work hardening, massage therapy, ultrasound, and injections.
3. In\_\_\_, Claimant suffered an injury to her right knee which was treated with arthroscopic surgery, an arthroplasty, in May 1996. Claimant underwent a knee replacement in February 2006.
4. Harris County, a self-insured government entity (Carrier), was the responsible insurer.
5. Between May 1996 and September 2005, Claimant showed increasingly-severe signs of skeletal degeneration including degenerative spur formation, facet osteoarthritis, a disk protrusion, and peripheral degenerative joint disease.
6. By October 2005, Claimant also had developed multi-level disc degeneration of her spine and moderate osteoarthritis of her left hip, not the one injured in\_\_\_. Certain movements of her knee caused pain, although she has full range of motion in her hips.
7. By February 2004, Claimant developed chronic pain syndrome and she was still diagnosed with this condition in the latter half of 2005.

8. Kenneth Mark Alo', M. D. (Respondent), began treating Claimant for her chronic pain syndrome in February 2004 and prescribed the medications at issue in this case.
9. Respondent prescribed four medications for pain management for November through December 2005. The four medications were: Duragesic patches (100 mg.), a continuous-release opiate pain medication; Zoloft (50 mg.), an anti-depressant; Sonata (10 mg.), a sleep medication; and, Lorazepam (0.5 mg), an anti-anxiety medication.
10. In 2005, Claimant was 63 years of age.
11. By August 2004, Claimant's hip injury had resolved and there were no residual symptoms. By November 9, 2005, she had no residual symptoms from the hip injury, although demonstrated symptoms of chronic pain syndrome.
12. Respondent's medical records from 2005 did not show objective measurement over time of the effectiveness of the medication regimen, particularly of the opiate medication, the Duragesic patches, for management of Claimant's chronic pain.
13. In mid-2005, Claimant was able to work at the sedentary level and worked full time through October 2005. She was not working in November 2005 but was able to drive an automobile.
14. On November 18, 2005, Prisco T. Evangelista, M. D., performed a Prospective Review Medical Examination (PRME) and concluded that the medications prescribed were necessary to treat Claimant during the last three months of 2005 and also that her \_\_\_ hip injury was the producing cause of the medical condition being treated.
15. On December 8, 2005, TWCC issued a Medical Interlocutory Order (MIO) ordering Carrier to pay for all medications recommended for payment in the PRME report.
16. On December 27, 2005, Carrier requested a hearing on the MIO.
17. Carrier paid for reimbursed the provider of the medications in accordance with the fee guidelines issued by the Texas Department of Insurance, Division of Workers' Compensation (Division).
18. On January 13, 2006, the Division issued a notice of hearing that included the date, time, and location of the hearing, the applicable statutes under which the hearing would be conducted, and a short, plain statement of matters asserted.
19. The hearing on the merits was continued on motion of the parties.
20. On May 11, 2007, the Division supplemented the notice of hearing with an expanded statement of matters asserted.

21. Administrative Law Judge Cassandra J. Church conducted a hearing on the merits on May 18, 2007, and the record closed that day.

### **III. CONCLUSIONS OF LAW**

1. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LABOR 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. Carrier had the burden of proof in this proceeding by a preponderance of the evidence, pursuant to TEX. LABOR CODE ANN. § 413.055, 1 TEX. ADMIN. CODE § 155.41, and 28 TEX. ADMIN CODE § 148.14.
4. The medications provided to Claimant under the authority of the MIO did not comprise health care reasonably required and medically necessary to treat Claimant's compensable injury that occurred on September 26, 1995, within the meaning of TEX. LABOR CODE ANN. § 408.021(a)(1).
5. Carrier is entitled to seek reimbursement from the subsequent injury fund for payments it made to Respondent for the medications, or to the provider dispensing medications prescribed by Respondent during the disputed period, under the mandate of the MIO, pursuant to 28 TEX. ADMIN. CODE § 134.650.

### **ORDER**

**IT IS THEREFORE, ORDERED** that Harris County is authorized to seek reimbursement from the subsequent injury fund, in accordance with 28 TEX. ADMIN. CODE § 116.11, for any payments made to Kenneth M. Alo', M. D., for the medications he dispensed during the disputed period, or to the provider dispensing medications prescribed by Dr. Alo', under the mandate of the MIO issued on December 8, 2005.

**SIGNED July 13, 2007.**

---

**CASSANDRA J. CHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**