

**SOAH DOCKET NO. 453-05-0947.M5
TWCC MR NO. M5-04-3142-01**

VONO.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	
	§	OF
LIBERTY MUTUAL FIRE INSURANCE,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

VONO (Petitioner) challenged the findings and decision of the Texas Workers' Compensation Commission's designee, an independent review organization (IRO), which found the prescription medications that Petitioner provided a workers' compensation claimant (Claimant) from May 23, 2003, through July 25, 2003, were not medically necessary. The IRO's decision upheld a denial of reimbursement by Liberty Mutual Fire Insurance (Carrier). After considering the evidence, the Administrative Law Judge (ALJ) finds the prescriptions were not medically necessary.

I. JURISDICTION, NOTICE, 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.

The hearing in this matter convened and the record closed April 27, 2005, before State Office of Administrative Hearings (SOAH) ALJ Catherine C. Egan. Petitioner was represented by its president, Nicky Otts. Respondent was represented by its attorney, Kevin J. Franta. The Commission Staff did not participate in the hearing.

II. DISCUSSION

A. Background

Claimant, a 28-year-old female, sustained a compensable injury to her lower back on ____, as she placed a heavy package on a high shelf. On January 13, 2000, an MRI was taken of her lumbar spine which showed minimal disc protrusion at L4-L5 and a transitional disc at L5-S1 with no focal herniation.¹ The EMG/NCV evaluations taken around this time were reported to be within normal limits.² Claimant was diagnosed with thoracic strain, muscle spasm, lumbago and degenerative disc disease at L4-L5. She was treated with conservative measures, and ultimately engaged in a work hardening program. During the program, Claimant noted having no pain to minimal pain.

On August 21, 2000, Claimant was evaluated by Roger Moczygemba, M.D., to assess whether she had reached maximum medical improvement (MMI). According to Dr. Moczygemba, Claimant reached MMI on August 21, 2000, with an impairment rating of five percent.³ Claimant returned to work, without restrictions, on September 18, 2000.

The following year, on October 14, 2001, Claimant requested that the Commission change her treating physician to Salvador Baylan, M.D. Although Claimant had reported minimal levels of pain prior to going to Dr. Baylan, she told Dr. Baylan on November 29, 2001, that she had ‘persistent sharp pain,’ a seven out of ten on the pain analog, in her lower back that radiated to her mid and upper back. Dr. Baylan diagnosed Claimant as having ‘discogenic low back pain with exacerbation,’

¹ Res. Ex. A at 25.

² Res. Ex. A at 37.

³ Res. Ex. A at 124.

and prescribed Vicodin (Hydrocodone), a narcotic and controlled substance, for Claimant's pain.⁴

On January 7, 2002, Dr. Baylan documented that Claimant was in her second trimester of pregnancy. Nevertheless, Dr. Baylan continued prescribing Vicodin to Claimant to treat her lower back pain through April 4, 2002, the last follow-up note from Dr. Baylan in 2002.

On March 24, 2003, Dr. Baylan documented that Claimant was quite functional and was able to work five hours a day. According to Dr. Baylan, Claimant suffered with 'chronic pain, non-discogenic, probably mechanical.'⁵ Dr. Baylan wrote that Claimant's pain was controlled by medications Ultram (a.k.a. Tramadol), Tizanidine, and Bextra.⁶ The following month, Dr. Baylan reported that Claimant was raising a 10-month-old baby. Dr. Baylan again wrote that Claimant's pain was 'well controlled' by the medications he prescribed.⁷

On April 30, 2003, William R. Culver, M.D., F.A.A.P.M.R., performed a retrospective peer review of Claimant's treatment. According to Dr. Culver, Claimant's compensable injury resolved itself shortly after treatment was provided in 2000, as indicated by her lack of pain and her ability to return to work. Dr. Culver opined that Claimant suffers with degenerative disc disease unrelated to the compensable injury, and that nothing related to the compensable injury justified the prolonged and continued use of Bextra (an anti-inflammatory), Ultram (a.k.a. Tramadol, a non-narcotic analgesic), Tizanidine (an antispastic), and Hydrocodone (a narcotic).⁸

⁴ Res. Ex. A at 141.

⁵ Res. Ex. A at 149.

⁶ Res. Ex. A at 150.

⁷ Res. Ex. A at 151-152.

⁸ Res. Ex. A at 154

From May through July 2003, Dr. Baylan continued prescribing to Claimant the medications Bextra, Ultram, and Tizanidine to address her pain. On May 23, 2003, Dr. Baylan wrote, '[t]he patient has chronic back pain and relatively stable (*sic*), and without any evidence of radiculopathy in spite of the fact that she has herniated disc.'⁹ On June 24, 2003, Dr. Baylan reported that Claimant had a 'herniated nucleus pulposus,' but did not indicate how he reached this conclusion or even to which disc he was referring.¹⁰

Petitioner filled Claimant's prescriptions for Ultram, Bextra and Tizanidine. Carrier denied payment to Petitioner for the prescriptions filled between May 23, 2003, and June 25, 2003, in the amount of \$793.08 based on the lack of medical necessity.

The IRO upheld Carrier's denial, stating that '[e]ven though this patient has mild lumbar disc variation the reviewer can find no material to validate the etiology of ongoing pain three and one half years after her initial injury.'¹¹ The IRO found that the compensable injury was a sprain/strain injury which should have been resolved after the first few weeks or months of therapy. According to the IRO, the medical records did not support the use of these drugs to treat the compensable 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, 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

⁹ Res. Ex. A at 161.

¹⁰ Res. Ex. A at 162.

¹¹ Pet. Ex. 1 at 4.

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

Petitioner and Carrier proffered various records, including those submitted to the IRO. Petitioner also offered a letter authored by Dr. Baylan dated October 13, 2003, and the testimony of Mr. Otts, a pharmacist. Carrier relied on the documentary evidence, including disciplinary orders issued against Dr. Baylan by the Texas Board of Medical Examiners (BME).

On October 4, 2002, BME issued an order restricting Dr. Baylan's medical practice for five years because he prescribed dangerous drugs or controlled substances in a manner inconsistent with the public health and welfare. According to BME's order, Dr. Baylan is prohibited from prescribing Schedule II and Schedule III controlled substances. With the exception of Schedule IV and Schedule V medications, Dr. Baylan is further prohibited from possessing, administering, dispensing, or prescribing any other controlled substances or dangerous drugs with addictive potential or potential for abuse. As for Schedule IV and Schedule V medications, Dr. Baylan could only prescribe those if it was medically indicated or medically necessary 'with supporting clinical findings properly documented in the patient's medical records.'¹²

Mr. Otts testified that the medications in issue and prescribed by Dr. Baylan (Bextra, Ultram, and Tizanidine) were not narcotics or controlled substances, and therefore did not violate BME's

¹² Res. Ex. C at 11.

order. Consequently, Mr. Otts argued, Dr. Baylan was not barred by the BME order from prescribing

these medications to Claimant, and that Dr. Baylan's treatment protocol for Claimant was reasonable. While Dr. Baylan initially treated Claimant with a narcotic, Vicodin, once the pain was under control, Mr. Otts opined, Dr. Baylan moved to a more conservative type of treatment with the other three medications.

Mr. Otts explained that Bextra is a non-steroidal anti-inflammatory; Ultram is a non-narcotic analgesic to treat acute and chronic pain; and Tizanidine is an antispasticity used to treat muscle spasms. Under cross-examination, Mr. Otts agreed that all drugs have side effects; including these three. Bextra has cardiovascular side effects.¹³ Ultram can cause drowsiness, dizziness, and nausea. Tizanidine can cause drowsiness and liver toxicity following long term use. In addition, Ultram may cause psychological dependence, although Mr. Otts testified that the medical reports are inconclusive on this issue.

Petitioner relied heavily on Dr. Baylan's October 13, 2003, 'Letter of Medical Necessity,' which stated that Claimant suffered with 'chronic low back pain syndrome secondary to lumbar herniated disc which she attributed to a work-related accident that occurred on 01-10-2000.'¹⁴ According to Dr. Baylan, Claimant's lower back pain was relatively inactive because of the prescribed medications. Dr. Baylan further stated that Claimant has a herniated disc, but does not provide any clarifying information regarding this herniated disc, including what disc Dr. Baylan maintained was herniated by the compensable injury, if any.

Carrier relied on the documentary evidence, most of which is summarized above. However, Carrier did focus on Claimant's performance before being treated by Dr. Baylan. In May 2000,

¹³ This side effect did not known until after the dates in issue.

¹⁴ Pet. Ex. 2.

Claimant began a work hardening program. While Claimant missed several days of the program, she

reported that her highest level of pain was a 2.5 out of 10.¹⁵ By the end of the program, Claimant had minimal to no pain. On June 30, 2000, Claimant reported that she was ‘not really having any pain,’ but was not quite ready to return to work.¹⁶ On July 6, 2000, Claimant underwent a functional capacity evaluation (FCE). Claimant reported to have minimal to no pain, but was documented to have symptom magnification and pain complaints that were inconsistent with her behavior.¹⁷

D. ALJ’s Analysis

Petitioner failed to meet its burden of proof. Dr. Baylan’s letter is replete with conclusory statements asserting that the prescriptions were medically necessary. The letter does not refer to objective diagnostic tests to support that Claimant’s condition, while Dr. Baylan was treating her, was related to her compensable injury. Without supporting diagnostic findings or other reliable medical documentation, Dr. Baylan’s conclusory statements are insufficient to prove by a preponderance of the evidence that the prescriptions were medically necessary to treat Claimant’s compensable injury.

Dr. Baylan also failed to provide a reasonable medical explanation for why he prescribed a narcotic to Claimant in late 2001 and early 2002, particularly given the BME’s disciplinary action taken against his medical license. BME found in late 2002 that Dr. Baylan’s use of narcotics to treat his patients was not always in the best interest of the patient. BME imposed a \$25,000 fine against Dr. Baylan and restricted his medical license, prohibiting him from prescribing controlled substances

¹⁵ Res. Ex. A at 83.

¹⁶ Res. Ex. A at 96.

¹⁷ Res. Ex. A at 106.

and any dangerous drugs with addictive potential or the potential for abuse. Mr. Otts agreed that Ultram has the potential to be addictive. Without testimony from Dr. Baylan to clarify the medical

reasons for his use of a narcotic to treat Claimant, and his prolonged use of Bextra, Ultram, and Tizanidine to treat her, Dr. Baylan's credibility was seriously diminished. Consequently, the ALJ placed little weight on Dr. Baylan's subjective findings in his medical records for Claimant, and his October 13, 2003, letter.

In addition, Carrier's evidence affirmatively established that the prescriptions were not medically necessary to treat Claimant's compensable injury. Claimant reported having no pain to minimal pain during and at the end of the work hardening program in 2000. In September 2000, she was able to return to work without restrictions. Yet, almost a year later she reported to Dr. Baylan that she was in excruciating pain. The lack of evidence to show what caused Claimant's abrupt change of condition supports Carrier's position that Claimant's pain was not due to the compensable injury.

Petitioner failed to establish that prescriptions provided Claimant by Petitioner from May 23, 2003, through July 25, 2003, were medically necessary healthcare required to treat the compensable injury, and therefore is not entitled to reimbursement from Carrier for these drugs.

III. FINDINGS OF FACT

1. On ____, Claimant sustained an injury to her lower back compensable under the Texas Workers' Compensation Act (Act) while she was placing a heavy package on a high shelf.
2. At the time of the compensable injury, Claimant's employer had workers' compensation insurance coverage with the Liberty Mutual Fire Insurance (Carrier).
3. On January 13, 2000, Claimant had an MRI taken of her lumbar spine which showed minimal disc protrusion at L4-L5 and a transitional disc at L5-S1 with no focal herniation.
4. Claimant underwent EMG/NCV studies around this same time that were normal.

5. Claimant's diagnoses included thoracic strain, muscle spasm, lumbago, and degenerative disc disease at L4-L5.
6. Claimant's treating physician treated her with conservative measures and ultimately had her participate in a work hardening program.
7. At the completion of the work hardening program, Claimant had no pain and was able to return to work.
8. Claimant reached maximum medical improvement (MMI) on August 21, 2000, with a five percent impairment rating.
9. Claimant returned to work without restrictions on September 18, 2000.
10. On November 29, 2001, Claimant went to Dr. Baylan for treatment.
11. Claimant reported to Dr. Baylan that she had persistent sharp pain in her lower back which Dr. Baylan diagnosed as discogenic low back pain with exacerbation.
12. Dr. Baylan did not explain what Claimant had done to exacerbate her lower back, and did not note objective findings to show that Claimant's pain was related to the compensable injury.
13. Dr. Baylan began treating Claimant's pain with Vicodin, a narcotic, which he continued to prescribe through April 2002, while Claimant was pregnant.
14. On October 4, 2002, the Texas State Board of Medical Examiners issued an order restricting Dr. Baylan's medical license prohibiting him from dispensing prescriptions for Schedule II and III controlled substances and any dangerous drugs with additive potential or the potential for abuse.
15. In March 2003, Claimant was functional and able to work at least five hours per day.
16. In 2003, Dr. Baylan prescribed Claimant Bextra, Ultram, and Tizanidine to Claimant, allegedly to address her back pain.
17. VONO (Petitioner) filled Claimant's drug prescriptions for Bextra, Ultram, and Tizanidine from May 23, 2003, through July 25, 2003.
18. Carrier denied reimbursement to Petitioner for the prescriptions based on the lack of medical

necessity.

19. Petitioner's appeal of the denial was considered by the Independent Review Organization (IRO).
20. The IRO's decision upheld Carrier's denial of reimbursement on the basis that the prescriptions were not medically necessary. Petitioner timely appealed that decision.
21. The Commission's notice of hearing 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.
22. Petitioner and Respondent were represented at the hearing, but the Commission Staff chose not to participate.
23. Claimant's back pain was not shown to be related to her compensable injury.
24. Ultram, Bextra, and Tizanidine were not medically necessary to treat Claimant's compensable injury from May 23, 2003, through July 25, 2003.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (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(d) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The IRO was authorized to review 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.
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
8. 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).
9. 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. § 401.011(31).
10. Petitioner is not entitled to reimbursement for the Ultram, Tizanidine, and Bextra it dispensed to Claimant from May 23, 2003, through July 25, 2003.

ORDER

It is ORDERED that VONO is not entitled to reimbursement by the Liberty Mutual Fire Insurance for the Ultram (Tramadol), Tizanidine, and Bextra dispensed to Claimant from May 23, 2003, through July 25, 2003.

SIGNED June 10, 2005.

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