

SOAH DOCKET NO. 453-05-5822.M5
TWCC MDR NO. M5-05-1676-01

**FIDELITY & GUARANTY INSURANCE
COMPANY,
Petitioner**



BEFORE THE STATE OFFICE

V.

OF

— **Respondent**

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. SUMMARY OF DECISION

Fidelity & Guaranty Insurance Company (FGIC or Petitioner) requested a hearing following the issuance on April 7, 2005 of the Findings and Decision of the Texas Workers' Compensation Commission (Commission). The Commission's Findings and Decision relied upon a decision of an Independent Review Organization (IRO), and ordered reimbursement to ___, Respondent, for her purchase of medications. As Petitioner, FGIC had the burden of proof.

After considering the evidence and arguments of the parties, the Administrative Law Judge (ALJ) concludes that the disputed medications purchased by ___ during the period October 29, 2003, through February 11, 2004, were reasonable and medically necessary. The cost of the medications should be reimbursed by FGIC to___.

II. PROCEDURAL HISTORY

The parties pre-filed all exhibits. The hearing convened on December 1, 2005. State Office of Administrative Hearings (SOAH) ALJ Paul Keeper presided. Counsel for FGIC was W. Jon Grove. Pursuant to a request, ___ appeared by telephone and represented herself. The parties called no witnesses, concurred in the evidence offered, and did not request to file briefs. The record closed upon the adjournment of the hearing on December 1, 2005. Neither party objected to notice or jurisdiction.

III. DISCUSSION

On ____, ____ suffered a work-related injury while she was unloading a truck. A boxed computer system fell on the back of her neck and right shoulder. On February 26, 2001 ____ had a chest x-ray and cervical spine x-ray. On that same date, ____ began to see her physician, A.J. Morris, M.D. She began physical therapy in March 2001 but did not continue for an extended period. In May and July 2001, ____ had MRIs of her right shoulder and spine, revealing post-traumatic tendinopathy and degenerative joint disease, among other diagnoses.¹ A CT scan in July 2001 confirmed these conditions. ____ physician prescribed pain medications, muscle relaxants, and anti-inflammatory medications. These drugs helped ____ return to work briefly.²

On January 16, 2003, J. Christopher Reynolds, M.D., an orthopedic surgeon, reviewed ____'s medical records and concluded that there was nothing in ____'s medical records to document the need for her continued use of narcotics, muscle relaxants, or prescription non-steroidal anti-inflammatory medications.³

On September 16, 2003, Charles E. Graham, M.D., an orthopedic surgeon, examined ____'s medical records. He concluded that the continued prescription medications were not reasonable and necessary because they were not related to the original injury.⁴

On December 17, 2003, Dr. Morris reported that ____ had been on maintenance care for pain relief.⁵

¹ __Ex. at VN0010.

² FGIC Ex. at __004.

³ FGIC Ex. at __011.

⁴ FGIC Ex. at __020.

⁵ __Ex. at __007-008. Dr. Morris' area of medical specialization was not disclosed. Dr. Morris' report was primarily a legal brief about ____s rights under Texas Workers' Compensation laws. Dr. Morris provided no medical information about ____other than stating that ____suffered from pain from her injury and required additional medical treatment.

On February 5, 2004, Gregg Diamond, M.D., board certified in physical medicine and rehabilitation, performed a required medical examination of _____. He diagnosed _____'s condition as neck pain with radiation into the right arm, right upper extremity pain, and shoulder impingement. During that examination, _____ reported constant severe pain for which her medications gave her some relief. Dr. Diamond recommended that _____ be taken off Soma in favor of Zanaflex. However, he concluded that the medication appeared to be more directed at the underlying degenerative spine disease and less so at the direct trauma injury. Finally, Dr. Diamond concluded that _____'s medications "have been reasonable to an extent but needs to be altered at this point in time."⁶

On August 25, 2004, Becky B. Personett, M.D., a doctor of undisclosed specialty, examined _____. Dr. Personett concluded that narcotics were not indicated for _____'s injury and recommended that _____ be weaned from the drugs slowly. She also recommended discontinuation of the non-steroidal anti-inflammatory medications because of _____'s other medical problems. Finally, Dr. Personett recommended that muscle relaxants were indicated but cautioned that the drugs should be used sparingly.⁷

On April 7, 2005, the Commission through the IRO, Envoy Medical Systems, L.P., issued its decision in this matter.⁸ Envoy's physician reviewer disagreed with FGIC's decision not to reimburse _____. The decision found that: (1) _____ continued to have changes in her cervical spine, (2) her condition could cause significant discomfort, and (3) the post-injury studies were compatible with the continued pain.⁹

⁶ FGIC Ex. at __016.

⁷ _____. Ex. at __0012.

⁸ On May 10, 2004, an IRO decision was issued by Forte in MDR Tracking No. M5-04-2220-01. The decision is included in the exhibits of FGIC. FCIC Ex. at __021-025. In that decision, the IRO physician agreed with FGIC's decision not to reimburse____ for "hydrocodone/APAP, Celebrex, Aciphex, Diazepam for dates of service 3/19/03-6/11/03." These are not the dates of service in this case. This IRO decision is not material to the request for reimbursement in this dispute. Even if the IRO decision were considered as material, it would not change the results in this Decision and Order.

⁹ FGIC Ex. at __004.

When ___ suffered her injury on ___, the medications prescribed for relief of her pain were medically necessary. The question is whether the medical necessity continued during the period for which ___ sought reimbursement. Dr. Reynolds concluded in January 2003 that the period of medical necessity for the medications had passed, and Dr. Graham concurred with that conclusion in September 2003.

Dr. Diamond concluded in February 2004 that ___'s use of medications had been reasonable but needed to be altered "at that point."¹⁰ His conclusion conflicted with the opinions of Drs. Reynolds and Graham. Dr. Personett's conclusions in August 2004 concurred in part with those of Dr. Diamond, but - Dr. Personett determined that ___'s muscle relaxants were medically necessary.¹¹

The law provides that a trier of fact has several alternatives when presented with conflicting evidence. It may believe one witness and disbelieve others. It may resolve inconsistencies in the testimony of any witness. It may accept lay testimony over that of experts.¹² In this case, the ALJ relies upon the testimony of Dr. Diamond that the medications had been reasonable through February 2004 but that the use of medications needed to be altered from that time forward.¹³ The ALJ also relies on Dr. Personett's conclusion that the muscle relaxants were medically necessary.¹⁴ Finally, if the ALJ were to determine that only the muscle relaxants should be reimbursed, the ALJ cannot determine which medications on the Disputed Services Table were for pain relief or muscle relaxation. FGIC had the burden of proof and did not provide more distinct information than that provided by ___.

¹⁰ FGIC Ex. at __ 016.

¹¹ ___'s Table of Disputed Services does not identify the types of medications for which ___ seeks reimbursement. __ Ex. at __007.

¹² *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986).

¹³ The ALJ acknowledges that Dr. Diamond had concluded that the medications were more for the treatment of ___'s non-covered medical problems. However, if the medications were intended and used for the treatment of her covered injury, then there was some reasonable medical necessity for their use.

¹⁴ Whether ___ should have used the medications "sparingly" is not an issue to be decided here.

The medications were reasonable and medically necessary during the period of October 29, 2003, through February 11, 2004. ___ should be reimbursed for \$754.65 for medications purchased during that period.

IV. FINDINGS OF FACT

1. On ___, ___ suffered a work-related injury to her back and right shoulder that caused her pain.
2. Between February and July 2001, ___ had a chest x-ray and cervical spine x-ray, MRIs of her shoulder and spine, and a CT scan.
3. ___'s physicians diagnosed her as having suffered an injury of her neck and shoulder, post-traumatic tendinopathy, and degenerative joint disease, among other diagnoses.
4. ___'s physician primary treating physician, A.J. Morris, M.D., prescribed pain medications, muscle relaxants, and anti-inflammatory medications.
5. On January 16, 2003, J. Christopher Reynolds, M.D., an orthopedic surgeon, concluded that there was nothing in ___'s medical records to document the need for her continued use of narcotics, muscle relaxants, or prescription non-steroidal anti-inflammatory medications.
6. On September 16, 2003, Charles E. Graham, M.D., an orthopedic surgeon, concluded that ___'s continued use of prescription medication was not reasonable and necessary because it was not related to the original injury.
7. On December 17, 2003, Dr. Morris reported that ___ suffered from pain from her injury and required additional medical treatment.
8. On February 5, 2004, Gregg Diamond, M.D., board certified in physical medicine and rehabilitation, examined ___ and concluded that: (1) her pain medications were more directed at the underlying degenerative spine disease rather than the direct trauma injury, and (2) ___'s use of medications had been reasonable through February 2004 but should be discontinued.
9. On August 25, 2004, Becky B. Personett, M.D., examined ___ and concluded that narcotics were not indicated, recommended that ___ be weaned from the drugs slowly, and recommended that muscle relaxants were indicated.
10. On April 7, 2005, the Texas Workers' Compensation Commission (Commission), acting through Envoy Medical Systems, L.P., the independent review organization, found that ___'s request for reimbursement should be approved because: (1) ___ continued to have changes in her cervical spine, (2) her condition could cause significant discomfort, and (3) the post-injury studies were compatible with the continued pain.

11. ___ is entitled to receive treatment, including reasonable and necessary medication, that relieves the effects of her work-related injury.
12. The treatment services provided by the medications that ___ purchased pursuant to a prescription from her physician were needed to relieve the effects of her work-related injury.
13. The medications relieved the effects of Claimant's work-related injury.
14. On May 17, 2005, the Commission issued a notice of hearing in this docket.
15. The hearing was convened on December 1, 2005, pursuant to the terms of the notice.
16. Counsel for FGIC was W. Jon Grove. Pursuant to a written request, ___ appeared by telephone and represented herself.
17. The record closed upon the adjournment of the hearing on December 1, 2005.

V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LABOR CODE ANN. §413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE (TAC) ch. 148.
3. The parties' requests for a hearing were timely made pursuant to 28 TAC § 148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. The party requesting the contested case hearing has the burden of proof.
6. The preponderance of the evidence demonstrated that the disputed medications purchased by ___ from October 29, 2003, through February 11, 2004, were reasonable and medically necessary.

ORDER

THEREFORE IT IS ORDERED that ___ is entitled to reimbursement from Fidelity & Guaranty Insurance Company for \$754.65 in medications purchased, plus any applicable interest, for the dates of service of October 29, 2003, through February 11, 2004.

SIGNED December 5, 2005.

**PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**