SOAH DOCKET NOS. 454-07-1464.P1 and 454-07-3091.P1
DWC NOS.____ and ___

SERVICE LLOYDS INSURANCE COMPANY, Petitioner	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION, AND DONALD D. BACON, M.D., Respondents	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Service Lloyds Insurance Company (Carrier) challenges two medical interlocutory orders (MIOs) issued by the Texas Department of Insurance, Division of Workers' Compensation (Division), requiring it to pay for certain office visits and medications over two sequential ninety-day periods. The cases were consolidated based on the parties' representation that the requested health care for the two periods involve the same issues. Because of the peculiar circumstances and effects of the underlying injury in this case, the Administrative Law Judge (ALJ) concludes that the medical care was not shown to be medically unnecessary. As a result, Carrier should not be reimbursed for payments it has made for the treatment.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The MIOs were issued on December 4, 2006, and April 2, 2007, respectively, pursuant to the Division's Prospective Review of Medical Care (PRM) rules at 28 TEX. ADMIN. CODE (TAC) § 133.650. The Carrier filed timely hearing requests. After the cases were consolidated and after being continued, the hearing convened on June 22, 2007, at the State Office of Administrative Hearings (SOAH), before the undersigned ALJ. The record closed on that date. Carrier and the

Division were represented by counsel, who appeared in person. Donald D. Bacon, 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) suffered an at-work right shoulder and neck sprain/strain on____, doing heavy lifting at his job as a school maintenance worker. He developed cervical and right upper extremity pain and was found to have disc herniations at his C5-6 and C6-7 spinal levels. He failed conservative care and underwent spinal fusion on March 7, 2002. Because of bleeding problems around the surgery site, he was paralyzed from his neck down after the surgery, and needed an emergency re-operation. He had some degree of paralysis for some months, but has gradually recovered most of his physical abilities and strength. His primary problem at this point is continued significant pain, including neuropathic pain, myofascial pain syndrome, and thoracic spine pain. He has been given a 60 percent impairment rating.

After Carrier denied the claim, Dr. Bacon submitted a PRM request for the following care over a 90-day period: one office visit per month for pain management over a 3-month period; Actiq (1200 mcg) Oral Transmucosal System One LPOP, 5 times a day, as needed for severe pain, 150 per month for 3 months; Methadone HCI (10 mg), 7 tablets 3 times per day, not to exceed 21, 630 per month for 3 months; Ambien (10 mg), 2 tablets per day, 60 per month for 3 months; Namenda (10 mg), 1 tablet 4 times per day, 120 per month for 3 months; Subutex, 2 per day, 60 per month for 3 months; Ducolax, 1 depository as needed per day, 30 per month for 3 months; and Hydrocodone/Acetaminophen, 1 tablet 4 times per day, 120 per month for 3 months. A PRM examination (PRME) doctor found the care to be medically necessary to treat Claimant's

compensable injury. After Carrier continued to deny payment, the Commission issued an MIO on December 4, 2006. Carrier timely requested a hearing before SOAH.

Dr. Bacon submitted a second PRM request for the following care over the next 90 days, after Carrier denied the claim: the same care and medications that were in the previous request plus Neurontin (600 mg), 3 times per day, 90 per month; Soma (240 mg), 4 times per day, 120 per month; Surfak (240 mg), 2 times per day, 60 per month; Senokat (50/8.6 mg), 2 at 2 times per day, 120 per month; Emla creme to use as directed; Flomax (0.4 mg), 2 times per day, 60 per month; and Provigil (200 mg), 2 times per day, 60 per month.

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.[1]

B. Analysis

[1] TEX. LABOR CODE ANN. § 413.055, 28 TEX. ADMIN. CODE (TAC) § 148.14(a).

This is a very difficult case to decide. Ordinarily, it would seem difficult to justify the amount of medications Claimant is receiving. However, in this case, Claimant's pain arises from problems with his initial surgery when he suffered much more severe injuries that resulted in complete paralysis from the neck down for a time and partial paralysis for a longer period of time. In this circumstance, Dr. Bacon's testimony that Claimant has suffered permanent central nervous system damage and will continue to experience neuropathic pain for an indefinite time is believable. Dr. Bacon's testimony that this type of pain is particularly difficult to deal with is also persuasive.[2]

Dr. Bacon's explanation of the reason for the medications, particularly the narcotics, to treat this condition was also convincing. These include Actiq, a strong rapid uptake narcotic to treat severe, breakthrough pain, particularly neuropathic pain that is very resistant to most medications; Methadone, a long-acting opiate with a very long half life that blocks pain pathways in ways other narcotics do not; and Hydrocodone, a shorter acting narcotic used to combat breakthrough pain. Namenda is an anti-seizure medication with an off-label use of blocking pain pathways in much the same way as Methadone. Dr. Bacon also testified that Ducolox is for constipation and Subutex stops withdrawal symptoms for patients weaning off other drugs.[3]

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[2] At the risk of stating the obvious, it should be pointed out that each case is decided on its on record. A different record could lead to a different conclusion with regard to the number and types of medication prescribed.

[3] Dr. Crane also testified concerning the use of the medications. Ambien assists in sleeping; Soma is a muscle relaxant; Neurontin is used for specialized forms of seizure, but is also good for managing neuropathic pain; Surfak and Sonokat assist with constipation problems; Flomax assists in urinary tract flow; Provigil helps with sleepiness during the day; and EMLA creme is for topical pain relief.

Claimant's 60 percent impairment rating gives further, strong support to a conclusion that the continuing effects of Claimant's initial operation are severe.

In this case more than most, the PRME doctor's opinions are important. The fact that on two occasions another physician has supported Dr. Bacon's requested treatment significantly moderates the weight of Dr. Drazner's very thoroughly-explained Required Medical Examination of Claimant in which he criticized the care provided to Claimant in very strong terms.[4] Dr. Drazner quoted other doctors, including Dr. Garza-Vale, Dr. Whithing, and Dr. Linderman, who opined that the Claimant needed to undergo an immediate detoxification program. However, this need was not obvious to and not shared by Claimant's treating physician, Dr. Bacon, or to the PRME doctor, both of whom examined Claimant. It is also notable that Claimant's previous doctors had prescribed numerous medications for Claimant prior to his seeing Dr. Bacon.[5]

In his testimony, Carrier witness Charles Crane, M.D., expressed the need for Claimant to undergo detoxification to establish a baseline starting point to determine which medications are necessary. Dr. Crane testified that presently it is almost impossible to determine what effect the various narcotics are having. However, Dr. Bacon's office notes[6] show he has monitored Claimant's medication use over a multi-year time period and has made numerous adjustments in his medication in an effort to control his pain.[7] Dr. Bacon testified he does not believe Claimant should go through a detoxification program at this time because without the current medication regime, Claimant could not continue his studies[8] and be a functional part of his family. There is no indication that Claimant has faked his need for the medications.

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[4] Ex. 2 at 14-34.

[5] Ex. 4 TDI/DWC 40.

[6] Ex. 4 at TDI/DWC 43-45, 56-61, 66-69, 71-72, 74, 76-85, and 87-89.

[7] Dr. Crane did acknowledge a possible need for this level of drugs in a case like this for up to three years after surgery.

[8] Claimant is currently enrolled in college and is carrying a 3.5 grade point average.

In view of the nature of Claimant's injury, his pain, the lack of evidence of faking his needs, the ALJ concludes that the fact Claimant has not, at this point, gone through a detoxification program is insufficient to find the requested care to be medically unnecessary.

Dr. Crane expressed concern with the absence of records on Claimant's use of the narcotics over such a long period, including the need for a daily pain diary, documentation of the effect of each medication, a regular tabulation of pill counts, and monitoring of Claimant's blood stream and urine levels to measure utilization. However, Dr. Bacon said he has monitored Claimant's urine and blood stream levels, including testing just before and just after his time for taking medications. Claimant has never taken more medication than has been prescribed and has not asked for early refills. He uses the same pharmacy for all prescriptions. Dr. Bacon prescribes medications for relatively short time periods and talks to Claimant on the telephone. Claimant has always acted appropriately. And, Claimant has shown obvious pain symptoms during office visits, such as constantly shaking his right hand.

The ALJ agrees with Dr. Crane's concern over the need for careful monitoring of Claimant's drug use and that Dr. Bacon's monitoring should be very careful in view of the numerous medications Claimant is receiving. However, in view of the nature of Claimant's injury and his intractable pain, the ALJ is not persuaded that less than very diligent monitoring of Claimant's drug usage at this point is sufficient to conclude that the medications are medically unnecessary.

Dr. Crane expressed strong concern that Claimant has not tried alternatives to his medication regime and Claimant's resistance to trying alternatives. Alternatives include a spinal cord stimulator, and implanted medication pump, a possible weaning program, and possibly detoxification. Dr. Bacon testified that he has discussed alternatives with Claimant, but Claimant has been understandably reluctant to undergo another surgical procedure such as a spinal cord stimulator. He said that recently that Claimant has decided he would like to try a spinal stimulator, but Carrier denied the request.[9]

[9] Ex. 4 TDI/DWC 89. Dr. Crane testified he did not seek medical dispute resolution after this denial.

The ALJ agrees with Dr. Crane that there is a significant need to explore alternatives to the Claimant's use of large amounts of medication, particularly the narcotics. Claimant and Dr. Bacon cannot reasonably expect Carrier to continue to provide coverage for these medications into the indefinite future without first attempting strategies to reduce Claimant's drug use. However, in view of Claimant's injury and the intractable nature of his pain, the ALJ cannot conclude at this time that his failure to try alternatives tips the weight of evidence in favor of a finding of a lack of medical necessity. The fact that Carrier denied one of the alternatives, a spinal stimulator, that its witness testified should have been attempted, is significant to this finding.[10]

An aspect of the evidence that the ALJ should address is Exhibit 3, a video that shows Claimant performing normal activities and lifting objects as heavy as a backpack. However, this evidence is not inconsistent with Dr. Bacon's testimony that Claimant has gotten most of his strength and functionality back and that his primary problem is continuing pain. The ALJ is unable to conclude from this video that Claimant has been faking his symptoms.

The ALJ will address one of the medications, Subutex, specifically. Ordinarily, it might seem that this drug, which is used to stop withdrawal symptoms for patients weaning off other drugs, would not be medically necessary in this case, where Carrier's appeal of the MIO for the other drugs will be denied. However, approval of this drug will give Dr. Bacon and Claimant a better chance to possibly start a weaning program from this time forward.

As a final note, the ALJ has some sympathy with Carrier's closing argument that the additional medications ordered by the second MIO simply show more drugs piled on an already heavy regimen. However, those drugs were not dealt with separately in the evidence and shown

[10] This conclusion should not be taken to indicate or imply that any absence of exploring alternatives might not tip the balance of evidence toward a finding of a lack of medical necessity in a similar, future case.

individually to be medically unnecessary. Because of this and in view of the fact that Carrier has the burden of proof, the ALJ is not able to sustain Carrier's appeal on the basis of these additional medications.

III. FINDINGS OF FACT

1. The injured worker (Claimant) suffered an at-work right shoulder and neck sprain/strain on_____, doing heavy lifting at his job as a school maintenance worker.

2. Claimant developed cervical pain and right upper extremity pain and was found to have disc herniations at his C5-6 and C6-7 spinal levels.

3. Claimant failed conservative care and underwent spinal fusion on March 7, 2002.

4. Because of bleeding problems around the surgery site, Claimant was paralyzed from his neck down after the surgery, and needed an emergency re-operation.

5. Claimant had some degree of paralysis for some period of time after the operation, but has gradually recovered most of his physical abilities and strength.

6. Claimant has continued to have significant pain, including neuropathic pain, myofascial pain syndrome, and thoracic spine pain.

7. Claimant has been given a 60 percent impairment rating.

8. Claimant's treating doctor, Donald D. Bacon, M.D., submitted a request for the following care over a 90-day period: one office visit per month for pain management over a three-month period; Actiq (1200 mcg) Oral Transmucosal System One LPOP, 5 times a day, as needed for severe pain, 150 per month for 3 months; Methadone HCI (10 mg), 7 tablets 3 times per day, not to exceed 21, 630 per month for 3 months; Ambien (10 mg), 2 tablets per day, 60 per month for 3 months; Namenda (10 mg), 1 tablet 4 times per day, 120 per month for 3 months; Subutex, 2 per day, 60 per month for 3 months; Ducolax, 1 depository as needed per day, 30 per month for 3 months; Hydrocodone/Acetaminophen, 1 tablet 4 times per day, 120 per month for 3 months.

9. After Claimant's employer's workers' compensation insurance carrier, Service Lloyds Insurance Company (Carrier), denied the request, Dr. Bacon requested a prospective review medical examination (PRME).

10. A PRME doctor found the care to be medically necessary to treat Claimant's compensable injury.

11. After Carrier continued to deny payment, the Commission issued a medical interlocutory order (MIO) on December 4, 2006, ordering the Carrier to pay for the requested care.

12. Not more than 20 days after receiving notice of the MIO, Carrier requested a hearing before the State Office of Administrative Hearings (SOAH).

13. Dr. Bacon submitted a second PRME request for the following care over the next 90 days, after Carrier denied the claim: the same care and medications that were in the previous request plus Neurontin (600 mg), 3 times per day, 90 per month; Soma (240 mg), 4 times per day, 120 per month; Surfak (240 mg), 2 times per day, 60 per month; Senokat (50/8.6 mg), 2 at 2 times per day, 120 per month; Emla creme; Flomax (0.4 mg), 2 times per day, 60 per month; and Provigil (200 mg), 2 times per day, 60 per month.

14. A PRME doctor found the care to be medically necessary to treat Claimant's compensable injury.

15. After Carrier continued to deny payment, the Commission issued an MIO on April 2, 2007, ordering Carrier to provide coverage for the requested care.

16. Not more than 20 days after receiving notice of the MIO, Carrier requested a hearing before SOAH .

17. Claimant has suffered permanent central nervous system damage and will continue to experience neuropathic pain for the indefinite future.

18. Neuropathic pain is particularly difficult to deal with.

19. The requested medications include Actiq, a strong rapid uptake narcotic to treat severe, breakthrough pain, particularly neuropathic pain that is very resistant to most medications; Methadone, a long-acting opiate with a very long half life that blocks pain pathways in ways other narcotics do not; Hydrocodone, a shorter acting narcotic used to combat breakthrough pain; Namenda, an anti-seizure medication with an off-label use of blocking pain pathways in much the same way as Methadone; Ducolox, Surfak and Sonokat for constipation; Subutex, to stop withdrawal symptoms for patients weaning off other drugs; Ambien, to assist in sleeping; Soma, a muscle relaxant; Neurontin, for managing neuropathic pain; Flomax, to assist in urinary tract flow; Provigil, to help with patients who experience sleepiness during the day; and EMLA creme for topical pain relief.

20. Dr. Bacon has monitored Claimant's medication use over a multi-year time period and has made numerous adjustments in his medication in an effort to control his pain.

21. There is no indication that Claimant has faked his need for medications.

22. Dr. Bacon has monitored Claimant's urine and blood stream levels, including testing just before and just after his time for taking medications.

23. Claimant has never taken more medication than has been prescribed and has not asked for early refills.

24. Claimant uses the same pharmacy for all prescriptions.

25. Dr. Bacon prescribes medications for relatively short time periods.

26. Dr. Bacon talks to Claimant on the telephone.

27. Claimant has always acted appropriately during his office visits with Dr. Bacon.

28. Claimant has demonstrated obvious pain symptoms during office visits such as constantly shaking his right hand.

29. The lack of trying alternatives to the medications is not, at this point in time, sufficient to conclude that the medications are medically unnecessary.

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 has the burden of proof in this proceeding. TEX. LAB. CODE ANN. § 413.055, 28 TEX. ADMIN. CODE (TAC) § 148.14(a).

4. Carrier failed to prove that the disputed care was medically unnecessary. TEX. LAB. CODE ANN. § 408.021.

ORDER

IT IS ORDERED that the Service Lloyds Insurance Company request, under 28 TEX. ADMIN. CODE § 134.650, to be reimbursed for payments for the disputed care provided to Claimant be, and the same is hereby, denied.

SIGNED July 16, 2007.

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JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS