

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 15 November 2012**

**Case No.: 2011-LHC-00565**

**OWCP No.: 07-119716**

**In the Matter of:**

**JOSEPH J. BERGHMAN,  
Claimant**

**v.**

**LIBERTY SERVICES,  
Employer  
and**

**ACE AMERICAN INSURANCE CO.,  
c/o ESIS Continuing Services,  
Carrier**

**APPEARANCES:**

**ART BREWSTER, ESQ.**  
On Behalf of the Claimant

**JEFFREY MANDEL, ESQ.**  
On Behalf of the Employer

**BEFORE: PATRICK M. ROSENOW**  
Administrative Law Judge

**DECISION AND ORDER**

**PROCEDURAL STATUS**

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act),<sup>1</sup> brought by Claimant against Employer.

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<sup>1</sup> 33 U.S.C. §§901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 18 Jan 11. All parties were represented by counsel. On 3 Apr 12, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:<sup>2</sup>

Witness Testimony of

Claimant  
Carolyn Berghman

Exhibits<sup>3</sup>

Joint Exhibits (JX)<sup>4</sup> 1, 1a, 2, 2a, 3-7  
Claimant's Exhibits (CX) 1-12  
Employer's Exhibits (EX) 1, 2

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

### **FACTUAL BACKGROUND**

Claimant was injured at work on 4 Aug 90, and is permanently and totally disabled. As a result of those injuries, he is receiving ongoing treatment and taking prescription medications to alleviate his chronic pain.

### **STIPULATIONS**<sup>5</sup>

1. Claimant was injured on 4 Aug 90 while in the course and scope of his employment with Employer, under circumstances that fall within the coverage of the Act.
2. There was timely notice, claim, and controversion.
3. Claimant is permanently and totally disabled and is being paid appropriate disability benefits.

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<sup>2</sup> I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

<sup>3</sup> Counsel were cautioned that since a number of exhibits (specifically CX-1, EX-2, JX-5) appeared to be *en globo* collections of records, counsel must cite during the hearing or in their post hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 6-7. Additionally, because the parties resolved several of the issues before me at hearing before they submitted their briefs, some of the evidence in the record was no longer relevant, such as that related to mileage. The evidence summarized in this Order relates only to the remaining issues in dispute.

<sup>4</sup> In the copy marked "Joint Exhibits 1" were additional exhibits also labeled 1-7. For convenience, I will refer to these exhibits as follows: JX-1a: CV of Dr. Arnold E. Feldman; JX-2a: Dr. Feldman DME Referral; JX-3: ESIS Utilization Review of 18 Feb 10; JX-4:ESIS Utilization Review of 22 Sep 10; JX-5: Detailed Patient Ledger; JX-6: Dr. Feldman letter of 22 Oct 07; JX-7: Dr. Joseph Crapanzano record of 28 May 09.

<sup>5</sup> JX-2; Tr. 8-15.

4. Claimant has reached maximum medical improvement (MMI).

## ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

Having resolved a dispute over payment for mileage and an MRI, Claimant seeks reimbursement only for three prescription medications: Viagra for sexual dysfunction, Lisinopril for blood pressure, and Phenergan/Promethazine to counteract the side-effects of the opiate medications he takes. Claimant argues these medications are necessary treatment related to the work injuries he suffered in 1990. Employer counters that Claimant failed to meet his burden of proof that these medications are related to his work injury.

## LAW

### Section 7 Medicals

Section 7 of the Act provides that the employer shall furnish such medical treatment as the nature of the injury and process of recovery may require.<sup>6</sup> For a medical expense to be assessed against the employer, it must be reasonable and necessary.<sup>7</sup> The claimant must establish that medical expenses are related to the compensable injury.<sup>8</sup> The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment.<sup>9</sup> A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.<sup>10</sup> An employer is only liable for the reasonable value of medical services.<sup>11</sup> An employer is not liable for medical expenses due to the degenerative processes of aging.<sup>12</sup>

The ALJ must make specific findings of fact regarding an employer's claim that a particular expense is non-compensable.<sup>13</sup> The judge has the authority to determine the reasonableness and necessity of a procedure refused by the employer.<sup>14</sup> A claimant is entitled to reimbursement for medical expenses paid when he has first requested authorization prior to obtaining the treatment.<sup>15</sup>

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<sup>6</sup> 33 U.S.C. § 907(a).

<sup>7</sup> *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

<sup>8</sup> *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981).

<sup>9</sup> *Lindsay v. George Wash. Univ.*, 279 F.2d 819 (D.C. Cir. 1960).

<sup>10</sup> *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

<sup>11</sup> 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 518 (1978).

<sup>12</sup> *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 349 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967).

<sup>13</sup> *Monrote v. Britton*, 237 F.2d 756, 759 (D.C. Cir. 1956).

<sup>14</sup> *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

<sup>15</sup> 33 U.S.C. § 907(d)(1); 20 C.F.R. § 702.421.

## EVIDENCE

### *Claimant testified in hearing in pertinent part that:*<sup>16</sup>

He is 57 and lives in Summit, Mississippi, in a rural area. His accident occurred when he was 35. He has been treating with Dr. Feldman for about eleven years. Dr. Feldman is in Baton Rouge.

Prior to his work-related incident, he didn't have any problems with high blood pressure. He hadn't been on high blood pressure medicine prior to the work-related incident. No doctors prescribed him Viagra until after the accident. He didn't have any problems with sexual dysfunction prior to the surgeries and medical treatment related to the accident. He didn't have any problems until he was 50. He can't say what the experience of the population of 57-year old men is with regard to increased blood pressure.

He gets Cipro, an antibiotic, after Dr. Feldman gives him an injection so he doesn't get a staph infection. He doesn't know why Dr. Feldman prescribes Phenergan. When he has injections, sometimes he gets a Demerol shot with Phenergan in it, for the pain. When he saw Dr. Brenner, he was having reflux issues. Dr. Feldman's prescription for Phenergan was not related to his treatment with Dr. Brenner.

His wife takes care of all of their bills. The insurance company denied his MRI and epidural steroid injections on numerous occasions. He worked out an arrangement with Dr. Feldman to pay monthly payments for the balance. Dr. Feldman was also treating him for an unrelated knee injury. He would personally pay Dr. Feldman for that treatment. He doesn't think he paid for the last injection, in July 2011.

### *Carolyn Berghman testified at hearing in pertinent part:*<sup>17</sup>

She has been married to Claimant for 32 years. Besides doing the mileage, she also takes care of the bills. There have been several times when there has been an outstanding balance regarding the treatment with Dr. Feldman.

Prior to the work accident, Claimant did not have any problems with high blood pressure. He had no problems with sexual dysfunction prior to his work-related accident, nor had he treated with a urologist or any other for sexual dysfunction.

When they get checks from Employer, there's no breakdown or itemization of what they're for. It usually just says mileage or prescriptions. There are some submissions for mileage for which they've never received a check. They usually put on the check the date of the mileage or prescription, but it's always different from her submissions, so they must have some other kind of bookkeeping.

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<sup>16</sup> Tr. 29-59

<sup>17</sup> Tr. 59-80.

***Dr. Arnold Feldman testified in deposition in pertinent part:***<sup>18</sup>

He is board-certified in anesthesiology and pain medicine and practices interventional pain medicine and anesthesiology. His records are all computerized after 2004, and he may have seen Claimant a few times before then. He saw Claimant consistently from 2004 onward and has been treating him for neck pain and back pain. He thinks he originally saw Claimant as a patient after his work-related injury. He thinks Claimant subsequently had surgery by Dr. Jackson. In other words, he got Claimant after the establishment of a chronic injury and subsequent neck and back surgery.

One of the main forms of his treatment of Claimant has been epidural steroid injections. The mainstay of therapy in a patient like this after a fairly substantial surgery is going to be interventional injections, maintenance of medication, evaluation, and possibly the implantation of what are known as neural augmentation devices such as spinal pumps and stimulators, which have not been done at that point.

He does not think he has rendered treatment for anything unrelated to Claimant's work-related injuries. The pain of the neck and the spine is often felt locally, but also often radiates to distant sites. For instance, back pain is also felt in the buttock, knee, hip and foot, so it's difficult to say something is absolutely related or not related to the injury. It's fair to say Claimant's pain is primarily in his neck and back. His early visits show chief complaints about his shoulder, arm, hands, neck, low back, knee, ankle, and digestive system.

Narcotic medications have digestive system effects, constipation being the most common problem. So Claimant's problems were primarily neck and back pain, but there are peripherally-related things. In his opinion, all the treatment he rendered was related to the work injury.

As he mentioned, two vexing side effects for people taking pain medicine chronically are constipation and nausea. Phenergan is a medication to directly counteract the nausea caused by the opiates. It is only taken on an as-needed basis. It should be relatively inexpensive, and it's a pretty standard anti-emetic agent. It is perfectly reasonable and necessary and is directly related to Claimant's workers' compensation injury.

He has also prescribed Lisinopril, which is an anti-hypertensive medication. He doesn't know whether Claimant had hypertension before his work injury. One of the side effects of pain is that your nervous system gets revved up, especially your sympathetic nervous system. That causes high blood pressure. So it's not inconceivable that when the patient's pain is under control, his blood pressure gets under control. But pain waxes and wanes, so it behooves them to keep Claimant's blood pressure under control because untreated hypertension can lead to heart attacks, strokes, kidney failure. He thinks it's reasonable to put Claimant on anti-hypertensive medication to keep his blood pressure within normal values, maybe obviating the long-term sequelae of untreated pain as well as untreated

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<sup>18</sup> JX-1, 1a, 2, 6.

hypertension. It's more likely than not that the use of Lisinopril is directly related to Claimant's workers' compensation injuries to his neck and low back.

Another well-known side-effect of chronic opiate therapy is that it causes a decrease in testosterone levels and libido. You could relate the prescription of Viagra to the subsequent therapy for the chronic painful condition.

His office contacts the adjuster for approval of any procedures or treatment recommended. He doesn't know specifically who they contact. He restricts himself to making the recommendation for the patient and it goes to someone else to obtain the preauthorization or precertification. He can't quite remember, but he thinks there were a number of occasions where it was problematic, difficult, or impossible to get a procedure done or approved. He thinks there was one occasion where he just did it anyway because it needed to get done. If he thinks something is absolutely necessary, he does what he thinks is necessary.

He doesn't order things he doesn't think are medically reasonable and necessary. If he treated Claimant without the adjuster's approval, it was because he was in extreme pain that was unrelieved by medication and the original surgeries, and he needed to be treated. All of the things he has done were related to Claimant's original work injury.

Claimant is a little bit overweight. He can't say that that's the cause of his hypertension. The most common cause of hypertension is idiopathic, which means we don't know what causes it. He cannot testify with certainty to the true cause of Claimant's hypertension. But pain tends to or can cause hypertension or elevations in blood pressure. Because he didn't know what Claimant was like before his injury, he can't say the cause. If he assumes for argument's sake that Claimant did have mild hypertension before the injury, certainly a chronic, severely painful condition would not lower his blood pressure, but raise it. He thinks it's reasonable to say that the treatment of his blood pressure is not only necessary but advisable. In his considered opinion, it is more likely than not that his high blood pressure is a result of his injury. He did say that he could not testify with a reasonable degree of medical certainty the true cause of Claimant's hypertension, but if he assumed Claimant had mild hypertension before, the painful condition would aggravate it.

People have erectile dysfunction for lots of reasons that have nothing to do with opiate medicines, surgeries, or anything having to do with an injury. He can't testify with a reasonable degree of medical certainty one way or the other as to Claimant's need for Viagra. It is well-documented that opiates cause a decrease in hormone levels of testosterone. He's not a urologist, but he doesn't think it's unreasonable to assume that twenty-plus years of debilitating pain would affect sexual health. If Claimant did not have any sexual dysfunction problems before his injury and surgeries, it would be his opinion that it's more likely than not related to his work injuries, surgeries, and medications. He is not aware of any studies that compare the general population to the population of males with lower back injuries with regard to the incidence of their need for Viagra. He can't

testify if Claimant's need is any different than what he would expect if Claimant was in the general population of men who are 50-some years old.

***Medical Center Pharmacy Records state in pertinent part:***<sup>19</sup>

Claimant paid for a prescription of Viagra on 21 Feb 07 in the amount of \$139.09. Employer paid for the prescription of Viagra on 20 Mar 07, 15 May 07, 12 Jun 07, 12 Jul 07, and 9 Aug 07.

Claimant paid for a prescription of Lisinopril on 8 Oct 07 and 1 Nov 07 in the amount of \$15.25. On 29 Nov 07 and 27 Dec 07, he paid \$26.95 for the prescription of Lisinopril. On 24 Jan 08, he paid \$19.85 for the prescription of Lisinopril. On 13 Feb 09, he paid \$13.25 for the prescription of Lisinopril. On 16 Mar 09, 10 Apr 09, 5 May 09, 2 Jun 09, 30 Jun 09, 28 Jul 09, 26 Aug 09, 28 Jul 11, 25 Aug 11, 22 Sep 11, 20 Oct 11, 17 Nov 11, and 15 Dec 11, he paid \$3.95 for the prescription of Lisinopril.

On 29 Nov 07 and 27 Dec 07, Claimant paid \$43.25 for a prescription of Promethazine.

**ANALYSIS**

Claimant made a *prima facie* case for compensation for the Viagra and Phenergan prescriptions. Claimant and his wife credibly testified that he did not suffer any sexual dysfunction before the work injury, and Dr. Feldman testified that chronic opiate use leads to the well-known side effect of lowered testosterone. He equivocated some in response to counsel's questions, but stated that people have erectile dysfunction for many different reasons, and if Claimant had no trouble before the work injury and surgeries, he would consider his need for Viagra now a result of that injury. I therefore find that it is more likely than not that Claimant's chronic opiate use led to his suffering from sexual dysfunction, and that the prescription for Viagra is a reasonable treatment of the condition. Even though Dr. Feldman could not unequivocally say that Claimant's sexual dysfunction was a result of the injury, Claimant's burden is to prove so by a preponderance, which he did.

Employer did not brief its objections to the Phenergan prescription, but Dr. Feldman clearly testified that the medication was used to treat nausea, which is a common side-effect of chronic opiate use. Claimant seemed unclear on what the Phenergan was for, but there is no doubt that it was reasonable and necessary to treat his secondary nausea. Employer did not rebut Claimant's *prima facie* case.

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<sup>19</sup> CX-1 (as cited, see n. 3).

Claimant also testified that he did not have any problems with high blood pressure before his work injury. Dr. Feldman again equivocated in his testimony as a result of counsel's questions, but stated that it was his medical opinion that more likely than not, Claimant's high blood pressure was a result of his state of chronic pain. He also testified, however, that the most common causes of hypertension are idiopathic, so he could not testify with certainty about the true cause of Claimant's hypertension. He went on to state that if Claimant had mild hypertension before the accident, he would attribute the aggravation of it to the injury. Claimant, however, clearly and credibly stated he had no problems with high blood pressure before the work injury. Although it is a close call because of the equivocal nature of the medical testimony, some of the equivocation is due to counsel's choice of words, and the record is still sufficient to establish that it is more likely than not that the pain secondary to the injury contributed at least in some small part to Claimant's hypertension.

For the above reasons, I find that Claimant's sexual dysfunction, hypertension, and nausea were related to his work injury. Prescriptions for Viagra, Lisinopril, and Phenergan were thus reasonable and necessary to treat these conditions, and must be compensated by Employer.

#### **ORDER AND DECISION**

1. Claimant's sexual dysfunction is a result of his work injury.
2. Claimant's nausea is a result of his work injury.
3. Claimant's high blood pressure was at least aggravated by his work injury.
4. Employer shall pay all past and future Section 7 medical expenses owing, related to these conditions including the medications discussed above.
5. Employer shall receive credit for any compensation heretofore paid, as and when paid. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961.<sup>20</sup>
6. The District Director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

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<sup>20</sup> Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267, 271 (1984).

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorneys' fees.<sup>21</sup> A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application, it must serve a copy on Claimant's counsel, who shall then have fifteen (15) days from service to file an answer thereto.

**ORDERED** this 15<sup>th</sup> day of November, 2012 at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>21</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524, 527 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 823 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director.