TENNESSEE BUREAU OF WORKERS' COMPENSATION
IN THE COURT OF WORKERS' COMPENSATION CLAIMS
AT MEMPHIS

RICHARD C. DIAMOND,	)	**Docket No. 2016-08-0916**
Employee,	)	
v.	)	**State File No. 21560 2016**
KROGER COMPANY,	)	
Employer.	)	**Judge Amber E. Luttrell**

COMPENSATION HEARING ORDER

Mr. Diamond suffered a work injury at Kroger and settled his claim with open future medical benefits. This case concerns the reasonableness and necessity of medications prescribed by Mr. Diamond's authorized treating pain-management physician, Dr. Dennis McCoy, and authorized treating psychiatrist, Dr. Jack Morgan, under the settlement's open medical provision. Kroger denied certain prescriptions after submitting them to utilization review. At issue are Dr. McCoy's prescriptions for Flexeril, a muscle relaxer; Oxycodone, an opioid pain medication; and Movantik, for opioid-induced constipation. Also disputed are Dr. Morgan's prescriptions for Lorazepam, an anxiety medication; and Temazepam, a sleep aid.[1] Mr. Diamond additionally requested payment of outstanding pharmacy bills for his denied prescriptions and attorney's fees.

The Court held a Compensation Hearing and for the reasons below holds: Mr. Diamond established by a preponderance of the evidence the reasonableness and necessity of the medication prescribed by the authorized physicians; Kroger shall pay Mr. Diamond's outstanding pharmacy bills under the Tennessee Workers' Compensation fee schedule; and Mr. Diamond's counsel is entitled to attorney's fees.

History of Claim

Mr. Diamond became injured on February 14, 2016, while working for Kroger. Kroger provided authorized treatment.

[1] At trial, Kroger agreed that authorization of Lyrica was no longer an issue.

Mr. Diamond received treatment for his cervical injury with panel-selected physicians Drs. Jeffrey Dlabach and Samuel Schroerlucke. After two surgeries, Dr. Schroerlucke released him at maximum medical improvement with a diagnosis of "status post anterior and posterior cervical fusion for severe stenosis and myelopathy." He assigned permanent work restrictions and assessed twenty-eight percent impairment to the body.

Despite having other injuries, Mr. Diamond only suffered permanent impairment for his cervical injury, so the parties entered a 2018 settlement agreement based only on that impairment. The settlement agreement read, "[T]he employer has accepted as compensable the injury to the employee's cervical spine, the only injury for which there is permanent impairment. Therefore, the parties agree that the settlement of the employee's permanent impairment is necessarily limited to the cervical spine injury." The settlement agreement states concerning future medicals:

> Employer agrees to pay for reasonable and necessary future medical expenses which are directly related to the subject injury, pursuant to Tenn. Code Ann. 50-6-204. Dr. Samuel R. Schroelucke shall be the designated authorized treating physician for future care (or a panel of physicians shall be provided for future care).

Some months following the settlement approval and after referral by Dr. Schroerlucke, Kroger authorized pain management with Dr. McCoy, counseling with Dr. Neil Aranov, and psychiatric treatment with Dr. Morgan. Mr. Diamond testified he selected them from panels.

Hearing Testimony

Mr. Diamond testified about his difficulty obtaining his prescriptions, their importance to his physical and emotional wellbeing, and he recalled how they were first prescribed.

Mr. Diamond first took Oxycodone prescribed by Dr. Schroerlucke after surgery. However, when he attempted to fill his prescription at Kroger Pharmacy, Kroger denied it, so he filled the medication on his personal health insurance through the end of 2017. He later began using Injured Workers Pharmacy (IWP) and has recently used MAC Pharmaceuticals (MAC).

After Dr. Schroerlucke released him, Mr. Diamond sought unauthorized treatment from his primary care provider, Kelly Badura, PA-C, until Kroger authorized treatment with Drs. McCoy and Morgan. During that period, PA Badura prescribed Oxycodone and Movantik. Before Movantik, Mr. Diamond tried Metamucil, Miralax, Colace, and "a red pill, which provided no relief." He paid for his prescriptions out-of-pocket at that time.

After Mr. Diamond began treatment with Drs. McCoy and Morgan, Dr. McCoy continued his prescription for Oxycodone and later added Movantik and Flexeril. Dr. Morgan continued his prescriptions for Lorazepam and Temazepam and added Trintellix, an antidepressant.

Mr. Diamond said his treatment with Drs. McCoy and Morgan, combined with his therapy with Dr. Aranov, "saved my life." Before his treatment, his pain was "excruciating." He could not sleep flat and had to sleep at an angle. He was quick to anger, isolated himself from his family, and "could not handle life." Since his treatment, he is "absolutely better." He sleeps better now, gets out of the house to shop with his wife, and feels more human.

Mr. Diamond now fills medications through IWP and/or MAC but sometimes experiences delays, and he has called his attorney for assistance in those instances. IWP and MAC have not billed him. Mr. Diamond confirmed he has not paid out-of-pocket for medications prescribed by Drs. McCoy and Morgan. Mr. Diamond requested the Court order Kroger to pay the outstanding balances owed to IWP and MAC for his prescriptions from May 23, 2018, to the present. Mr. Diamond testified the carrier asked him to use Kroger Pharmacy in October 2019 and provided him a pharmacy card. He attempted to use the card twice at Kroger, but his prescriptions were rejected both times. He stated he had no choice but to fill his prescriptions elsewhere.

On cross-examination, Mr. Diamond acknowledged PA Badura prescribed Lorazepam and Temazepam before his work injury during a period when he experienced some personal setbacks.

The parties introduced three medical depositions, summarized below from Dr. McCoy, Dr. Morgan, and Dr. Jeffrey Hazlewood.

Dr. McCoy

Dr. McCoy explained why he prescribed Oxycodone, Flexeril and Movantik to Mr. Diamond, the steps he takes to monitor and control their use, and why those medications are appropriate and necessary despite the UR physicians' concerns over addiction-risk and expense.

Dr. McCoy began treating Mr. Diamond in May 2018 after surgery and a referral to medical management since Mr. Diamond was no longer considered a surgical candidate. At his initial visit, Dr. McCoy recommended Mr. Diamond take extended-release Oxycodone 20 mg three times per day because it is less addictive and longer-lasting for most patients. Dr. McCoy acknowledged a need for caution with Oxycodone but testified it is safe if the patient takes the medication as prescribed and does not use other sedatives or excessive alcohol.

Dr. McCoy monitored Mr. Diamond's medication use by urine testing and checking on internet prescription databases. He testified that all of Mr. Diamond's tests and the database checks were consistent, and Mr. Diamond only asked for medications time-appropriately. Mr. Diamond signed an opioid contract. Dr. McCoy testified he was aware that Mr. Diamond was also taking Lorazepam and Temazepam and stated that Dr. Morgan's treatment was not contrary to his treatment.

Later, Dr. McCoy added Flexeril for Mr. Diamond's muscle spasms and Lyrica for neuropathic pain. He testified that the combination of the three medications "keeps his opioid doses low[.]" Dr. McCoy later prescribed Movantik.

As his treatment continued, Dr. McCoy noted Mr. Diamond was stable and benefited from his medications. Mr. Diamond reported to Dr. McCoy that he benefited from the therapy, which improved his quality of life.

Dr. McCoy testified regarding the denial of medications based on utilization review (UR). The UR physician denied Flexeril because it is recommended only for short-term use. Dr. McCoy explained his choice of Flexeril by testifying that Mr. Diamond has "ongoing stenosis, osteophyte scar tissue that's not going to go away." He continued, "Muscles, themselves, cannot feel pain, so they contract and spasm. Now, if you allow that to happen too long, it causes severe pain at that point, so the muscle relaxants target that and it . . . it can be used long term." He further stated he has seen positive results using Flexeril long-term because it allows low-dose opioid use.

About the UR denial of Oxycodone, Dr. McCoy testified he saw no evidence of Mr. Diamond becoming addicted or misusing it. He acknowledged that at some point, Mr. Diamond will become tolerant to the Oxycodone. When that happens, Mr. Diamond will be moved to a different class of drug, providing a better result with less risk. Dr. McCoy explained that due to a recent policy change, he intends to work with Mr. Diamond to reduce his need for the combination of Oxycodone, Lorazepam, and Temazepam.

Dr. McCoy further discussed the UR denial of Movantik. He testified that, for opioid-induced constipation, "there are very few medications that target the opioids to allow the patient to go. If I gave this patient Colace, Senekot, or any of those alternatives, it's not addressing the opioid portion."

Dr. McCoy testified that tapering off Mr. Diamond's medication, as the UR physician suggested, without prescribing alternatives, would "severely limit his life." He concluded to a reasonable degree of medical certainty that Oxycodone, Flexeril, Lyrica, and Movantik have all been necessary to treat Mr. Diamond's pain. He stated, "Mr. Diamond has been a model patient. He's done everything we've asked."

Dr. Morgan

Dr. Morgan testified to a reasonable degree of medical certainty that all of his treatment of Mr. Diamond was directly related to his work injury. He also explained the appropriateness and necessity of Lorazepam and Temazepam and how those medications benefit Mr. Diamond, including improving his sleep and reducing emotional stress so that his pain medication is more effective.

Dr. Morgan began treating Mr. Diamond in June 2018 for depression, emotional volatility, and anger. He initially described Mr. Diamond as struggling with moderate to moderately-severe emotional distress in various ways associated with his work injury. He stated that Mr. Diamond's prior treatment with Dr. Badura related to his personal setbacks was limited to low-dose Lorazepam and Temazepam. Dr. Morgan testified that he prescribed Trintellix, a newer antidepressant that can affect certain types of pain transmission and signaling. He also continued the Lorazepam and Temazepam.

Dr. Morgan explained the use of Lorazepam and Temazepam. Lorazepam is an anti-anxiety agent that "can help suppress and kind of put a lid on issues of emotional volatility, outbursts of anger and agitation and frustration[.]" It reduces emotional stress, so the amount of opioids or other pain medication may be more effective, and the patient can use fewer of them. He prescribed one milligram of Lorazepam twice daily, which he stated was "not a particularly high dose."

Concerning Temazepam, he testified it was appropriate because Mr. Diamond was in obvious discomfort and not getting restorative sleep. He explained:

> As to whether [the medications] were necessary or appropriate in my mind, the way to judge that first and foremost is ask the question is, did they help? And I don't know of any clinician that's working with him, Dr. McCoy, Dr. Aranov, myself, I don't know of anybody who wouldn't say that he finally started to get better.

Dr. Morgan testified Mr. Diamond is "absolutely" much better now than when he first started treatment.

As for the denial of the Lorazepam and Temazepam, Dr. Morgan stated he was aware that Mr. Diamond was taking Oxycodone and copied Dr. McCoy on his notes. He stated that no law or regulation prohibits use of both Lorazepam and Oxycodone together. He explained, "There are regulations and treatment guidelines that suggest that when they're being used that you come to a reasonable conclusion that there's a rational basis for their use, that you are cautious and prudent about it and that you go forward."

Dr. Morgan further addressed the denial of Lorazepam based on the risk of

dependency with long-term use, stating:

> I practiced addiction medicine for about twenty years. I've written text books about it. I know what I'm doing about it. I know that in terms of developing dependency that there is sort of the combination, what's the dose, what's the duration of the dose, are you seeing any indications at all of developing a tolerance where all of a sudden, this isn't working, I need more. None of those things have ever surfaced with Mr. Diamond.

Dr. Morgan noted in August 2018 that the carrier denied the Trintellix and Lorazepam he prescribed. He stated he appealed the UR denial, and it was overturned.

Had Dr. Morgan stopped Mr. Diamond's medication without an alternative, as suggested by the carrier, he stated:

> I think he would have turned around and gone back to where he was when we first met him in terms of symptomatic presentation. I mean, I think we all had a fairly uniform impression that the medications had really done—were doing a very nice job of modulating mood, modulating behavior, frustration, tolerance, all those kinds of things. I mean, even Dr. Aranov, I know because he told me, gave the medications in this case more credit for improvement than what he was doing.

Dr. Morgan continued to see Mr. Diamond for follow-up, maintained his medication at the same levels, and stated he remained stabilized and was improving. As of January 2019, Dr. Morgan noted that "there are no additive effects of benzodiazepines and opioids while there is evidence of their benefit." Dr. Morgan further stated that his plan, at some point, is to taper and eventually discontinue Lorazepam and possibly Temazepam. However, he emphasized the timing. He stated that Mr. Diamond needs Trintellix for the rest of his life.

Several months later, Dr. Morgan noted Mr. Diamond's concerns regarding accessing his prescriptions. Dr. Morgan stated that Dr. McCoy's office opened a pharmacy, and Mr. Diamond's medications were denied. Dr. Morgan testified that his pharmacist nonetheless made sure he did not miss his medications while they were trying to straighten out the problems.

Dr. Hazlewood

Dr. Hazlewood performed a records-review, reading extensive records, excluding PA Badura's. Dr. Hazlewood testified that Mr. Diamond had a "definite significant injury" and extensive surgeries, necessitating pain management. He stated he does not believe all patients need to be off opioids but that the physician writing opioids must assess the benefits and risks. Dr. Hazlewood stated the possible benefits of opioids are

patients feel better with their pain and their quality of life improves. The risks include the potential for addiction, becoming tolerant, death from respiratory depression, and opioid-induced mood disorder, among others.

In Mr. Diamond's case, Dr. Hazlewood disagreed with Dr. McCoy. He concluded that the risks outweigh the benefits of his use of Oxycodone alone and when combined with other medications. He stated that mixing the opioid with the other medications "significantly elevated" the risks. Dr. Hazlewood disagreed with Drs. Morgan's and McCoy's opinions that Mr. Diamond was at low risk for addiction based on an opioid addiction risk tool. He believed the risk is higher because of the sixty-milligram Oxycodone dosage. Further, Dr. Hazlewood noted Mr. Diamond regularly reported a seven out of ten on the pain scale after medication to Dr. McCoy, which he did not consider a significant benefit. He also commented that Mr. Diamond was not working and did not see objective indications of functional improvement. Dr. Hazlewood recommended Mr. Diamond be slowly weaned off Oxycodone.

Dr. Hazlewood considered the UR denials for Mr. Diamond's other medications. He agreed with the UR physician's opinion that chronic use of muscle relaxers such as Flexeril was not supported by research, and he was concerned about mixing Flexeril with other medications. Dr. Hazlewood also agreed with the Movantik denials. He testified it is not dangerous but is "expensive," and Mr. Diamond had not tried first-line drugs. He also stated that if Mr. Diamond were slowly weaned from the opioid, he would no longer need Movantik. Dr. Hazelwood deferred to Dr. Morgan regarding the psychiatric medications.

Additional Testimony

The parties introduced deposition testimony from persons familiar with the carrier's process for reviewing prescriptions and its denials in Mr. Diamond's case based on UR, as well as the pharmacies' procedures for filling his prescriptions.

Andrea Fitz, claims adjuster, testified the carrier denied forty-five medications under UR decisions. Since Mr. Diamond's settlement approval, Ms. Fitz stated that Lorazepam, Temazepam, Trintellix, and Lyrica were approved, and the carrier approved some of the prescriptions filled by IWP from Dr. Morgan and a few of Dr. McCoy's. Regarding the process for IWP, Ms. Fitz said that it often dispensed medication to Mr. Diamond regardless of whether the carrier accepted it. As for MAC, Ms. Fitz said it should have submitted the prescriptions through their online system for approval decisions.

Michael Sposito, IWP's claims manager, testified that IWP is primarily in the business of filling prescriptions in workers' compensation claims. Mr. Sposito provided a "Reimbursement Worksheet" containing Mr. Diamond's prescription history, the amounts charged, and whether they were paid or unpaid by Sedgwick.

Regarding UR, Mr. Sposito stated if a prescription was referred to UR, IWP would communicate with the carrier to determine if it will be paid or not following the UR decision. Mr. Sposito testified that IWP sometimes fills prescriptions after UR denials "as long as the claim was in litigation and being pursued." However, if the court found the prescriptions were not reasonable and necessary, IWP would no longer fill them. He further testified that IWP would not pursue payment for Mr. Diamond's medication from him if the court ruled against him. He testified that IWP understands there is a risk of filling medications when they may never be reimbursed.

Tamika Russell, a MAC pharmacist, testified about the process when Mr. Diamond presented prescriptions and about MAC's unpaid bills. Ms. Russell testified she immediately received electronic rejections for his prescriptions and telephoned the carrier requesting authorization. MAC eventually filled Mr. Diamond's medications prescribed by Dr. McCoy between August 22 and November 20. After filling Mr. Diamond's medications, she continued to follow up with the carrier regarding the initially rejected claims and was told they were still pending. MAC did not bill Mr. Diamond for the prescriptions.

Findings of Fact and Conclusions of Law

At a Compensation Hearing, Mr. Diamond must establish by a preponderance of the evidence that he is entitled to the requested benefits. *Willis v. All Staff*, 2015 TN Wrk. Comp. App. Bd. LEXIS 42, at *18 (Nov. 9, 2015); *see also* Tenn. Code Ann. § 50-6-239(c)(6) (2019).

Jurisdiction

The Court first addresses Kroger's argument that this Court lacks subject-matter jurisdiction to hear any dispute concerning Mr. Diamond's psychiatric treatment with Dr. Morgan based on the 2018 settlement agreement.

The 2013 Reform Act vested the Court of Workers' Compensation Claims with exclusive jurisdiction over claims with dates of injury on or after July 1, 2014. Further, Tennessee Code Annotated section 50-6-238(a)(3) authorizes workers' compensation judges "to hear and determine claims for compensation, . . . and *to make orders, decisions, and determinations*." (Emphasis added.) Under the statute, Mr. Diamond's only recourse to resolve disputes arising over his authorized psychiatric treatment with Dr. Morgan is in this Court.

Kroger relied on a paragraph that states, in part, that Mr. Diamond alleged:

> injuries to his cervical spine, a dental injury, injury to his head and side of his face and a mental injury. Employer has questioned whether all such alleged injuries are compensable. However, the employer has accepted as compensable the injury to the employee's cervical spine, the only injury for

> which there is permanent impairment. Therefore, the parties agree that the settlement of the *employee's permanent impairment* is necessarily limited to the cervical spine injury.

(Emphasis added.) However the settlement agreement also states that Kroger will pay for "reasonable and necessary future medical expenses which are directly related to the subject injury[.]"

Mr. Diamond argued Kroger wanted to resolve his permanent partial disability claim based only on the cervical injury, since it was the injury for which he was assigned impairment. Mr. Diamond further contended the future medicals paragraph contained no limitation on future medical benefits except for the requirement that they must be related to the injury.

A plain reading of the settlement agreement supports Mr. Diamond's position. The agreement provides the parties' *settlement of permanent impairment* was limited to the cervical spine injury because Mr. Diamond's cervical injury was the only condition for which an impairment rating was assigned. In contrast, the future medicals paragraph does not limit Mr. Diamond's future medicals only to his cervical spine. Instead, the language provides future medical expenses directly related to his injury with Dr. Schroerlucke.

The uncontroverted proof is that Drs. Schroerklucke and Dlabach referred Mr. Diamond for psychiatric treatment as a result of his work injury, and Kroger provided a psychiatric panel after the settlement approval from which Mr. Diamond selected Dr. Morgan. Notably, Dr. Morgan copied Dr. Schroerlucke on his records. For these reasons, the Court finds no merit in Kroger's jurisdiction argument.

Necessity of Treatment

The parties agreed that Drs. McCoy and Morgan are Mr. Diamond's authorized treating physicians and that under Tennessee Code Annotated section 50-6-204(a)(3)(H), any treatment they recommend "shall be presumed to be medically necessary for treatment," which presumption is rebuttable by a preponderance of the evidence. *See Morgan v. Macy's,* 2016 TN Wrk. Comp. App. Bd. LEXIS 39 (Aug. 31, 2016).

Mindful of the above, the issue is whether Kroger successfully rebutted the presumption of medical necessity of Drs. McCoy and Morgan's treatment by a preponderance of the evidence. For the reasons below, the Court finds Kroger did not.

In analyzing the conflicting medical opinions, the Court may consider the experts' qualifications, the circumstances of their examination, the information available to them, and evaluation of that information through other experts. *Brees v. Escape Day Spa & Salon*, 2015 TN Wrk. Comp App. Bd. LEXIS 5, at *14 (Mar. 12, 2015). Applying the

first factor, the Court finds the differences in their qualifications are not determinative. As for the circumstances of the evaluation and the information available, the Court finds the records and testimony of Drs. McCoy and Morgan demonstrated continuous treatment of Mr. Diamond. Dr. Hazlewood performed a thorough review of Mr. Diamond's records, although he did not have the benefit of an in-person evaluation. Nevertheless, this factor is not determinative.

The Court therefore turns to the competing medical proof regarding each prescription and considers the basis for the physicians' opinions.

Beginning with Flexeril, Dr. McCoy gave compelling testimony supporting its use for Mr. Diamond's condition. He responded to the denials by explaining that Flexeril, in combination with Lyrica and Oxycodone, keeps Mr. Diamond's opioid dose low. He explained that Mr. Diamond has "ongoing stenosis, osteophyte scar tissue that's not going to go away." He further said that muscle relaxants target spasms, and he has seen positive results from long-term use because it allows low-dose opioid use.

Turning to the prescriptions for Oxycodone, Lorazepam, and Temazepam, the primary dispute concerns Mr. Diamond's chronic use of Oxycodone alone and with the other medications. Dr. Hazlewood emphasized that Mr. Diamond had a significant injury and needs pain management. Nonetheless, he believed Mr. Diamond should be off opioids because he believed the risks outweigh the benefits in this case.

In contrast, Dr. McCoy explained Oxycodone works well for bone and tissue pain but acknowledged the risk. He testified that his role is to mitigate those risks. The Court finds Dr. McCoy consistently monitored Mr. Diamond's use of the medication and emphasized he showed no signs of addiction or overuse of his medication. Significantly, Dr. McCoy stated Mr. Diamond only asked for his medications time-appropriately and described him as a "model patient." He believed Mr. Diamond benefited from therapy, and it allowed him to have a higher quality of life. He also recognized the risk associated with combining Oxycodone with other medications. He stated Dr. Morgan's prescriptions for Lorazepam and Temazepam were not contrary his treatment. However, he indicated he intends to work with Mr. Diamond to reduce his need for either the Oxycodone or Lorazepam and Temazepam.

As for Dr. Morgan's opinion on Oxycodone in combination with the medications, he explained that no law that prohibits the use of both Lorazepam and Oxycodone together. However, he stated "there are regulations and treatment guidelines that suggest that when they're being used that you come to a reasonable conclusion that there's a rational basis for their use, you are cautious and prudent about it." The Court finds both Drs. McCoy and Morgan provided a rational basis for use of the medications and demonstrated they were cautious and prudent in their treatment of Mr. Diamond. Dr. Morgan was aware of Dr. McCoy's treatment of Mr. Diamond at all times and

emphasized that following treatment, Mr. Diamond was "absolutely" much better now than when he first started treatment. Like Dr. McCoy, Dr. Morgan closely monitored Mr. Diamond for any sign of tolerance or addiction to the medication. Significantly, the Court notes Dr. Morgan practiced addiction medicine for twenty years, has written textbooks on the subject, and testified he knows what he is doing.

Regarding Mr. Diamond's ongoing treatment, Dr. Morgan suggested that, while Mr. Diamond's medication has been beneficial, his plan at some point is to taper and eventually discontinue the Lorazepam and possibly Temazepam. However, he emphasized the timing was important. Dr. Hazlewood agreed with this plan.

Lastly, turning to Movantik, the Court is persuaded by Dr. McCoy's testimony, combined with Mr. Diamond's, on the necessity of the medication. Dr. McCoy testified that for opioid-induced constipation, very few medications target the opioids. Contrary to Dr. Hazlewood's statements that Mr. Diamond failed to try other medications first, Mr. Diamond testified that while he was treating with PA Badura, he tried several other medications with no benefit before Movantik. He further testified that when his prescription was denied, he had to seek treatment at the emergency room due to the severity of his symptoms. He stated that Movantik has effectively treated this condition.

When weighing the proof in this case, the Court must also consider Mr. Diamond's testimony. Significantly, the Court finds Mr. Diamond was a straightforward, credible witness. He appeared calm, at ease, self-assured, steady, confident, forthcoming, reasonable, and honest. These characteristics, according to the Tennessee Supreme Court, indicate reliability. *See Kelly v. Kelly,* 445 S.W.3d 685, 694-695 (Tenn. 2014). Drs. McCoy and Morgan also found Mr. Diamond credible in their treatment. He credibly testified that before his treatment with Dr. McCoy, Dr. Morgan, and therapy with Dr. Aranov, his pain was "excruciating." He could not sleep well and was quick to anger. Since his treatment, he still has pain, but the medication "takes the edge off the pain" and he "has a sense of living again." He sleeps better now, gets out of the house to shop with his wife, and feels more human. The Court finds Mr. Diamond's testimony suggests a greater benefit from his treatment than what is reflected in the records reviewed by Dr. Hazlewood.

After thorough analysis of the proof, the Court finds the testimony of Drs. McCoy and Morgan, combined with Mr. Diamond's testimony, more persuasive and holds Kroger did not overcome the presumption of medical necessity afforded to them by a preponderance of the evidence.

Pharmacy Bills

Regarding the outstanding pharmacy bills to IWP and MAC, Kroger argued that because IWP and MAC never billed Mr. Diamond and stated they will not pursue payment from him if Kroger is not held liable, Mr. Diamond lacks standing to seek

payment for bills because he did not "incur" the bills. The Court disagrees.

Again, the 2013 Workers' Compensation Reform Act vested this Court with exclusive jurisdiction over claims for workers' compensation benefits for dates of injury on or after July 1, 2014. The Court finds Mr. Diamond, the injured worker, has standing to bring a workers' compensation action against his employer for benefits, including payment of medical bills. Tennessee Code Annotated section 50-6-204(a)(1)(A) provides, "*The employer or the employer's agent shall furnish*, free of charge to employee, such medical and surgical treatment, medical and surgical supplies, . . . as ordered by the attending physician . . .made reasonably necessary by accident." (Emphasis added.)

Here, Kroger's argument suggests that because IWP and MAC filled Mr. Diamond's prescriptions without approval and will not pursue payment from Mr. Diamond, Kroger has no obligation under section 50-6-204 to furnish the medication. The Court does not find merit in its argument. Based on the Court's holding above, the Court holds under section 50-6-204(a)(1)(A), Kroger is liable for payment of Mr. Diamond's outstanding prescription bills as ordered by his authorized treating physicians. Kroger shall pay the providers directly.

Mr. Diamond argued that IWP and MAC's bills should be paid at a higher retail rate outside the fee schedule since Kroger denied payment for the prescriptions. The Court disagrees and holds under Tennessee Code Annotated section 50-6-204(a)(3)(A)(iii), Kroger's liability for the medical bills are limited to "the maximum allowable fees established in the applicable medical fee schedule."

Attorney's Fees

Lastly, Mr. Diamond requested attorney's fees and expenses under Tennessee Code Annotated section 50-6-226 for his work in securing Mr. Diamond's medical benefits under his settlement.

Based on Mr. Diamond's injury date, the only avenue for him to be awarded attorneys' fees is section 50-6-226(d)(1)(A), which provide: "[T]he court of workers' compensation claims may award reasonable attorneys' fees and reasonable costs . . . incurred when the employer fails to furnish appropriate medical, surgical, and dental treatment or care, medicine, . . . to an employee provided for in a settlement[.]"

Unlike attorneys' fees for wrongful denials under 50-6-226(d)(1)(B), the Court cannot find case law under the Reform Act on attorneys' fees under subsection (d)(1)(A). However, authority exists under the pre-Reform version of the statute. For injuries occurring before July 1, 2014, Tennessee Code Annotated section 50-6-204(b)(2) (2014) allowed a trial court to award attorney's fees and expenses when an employer refused to provide medical care required by a settlement or judgment.

In *Grissom v. UPS*, No. M2016-00127-SC-R3-WC, 2017 Tenn. LEXIS 4 (Workers' Comp. Panel Jan. 9, 2017), the Supreme Court Panel affirmed an attorney's fees award under section 50-6-204(b)(2) with similar facts. In *Grissom*, the employee entered into a settlement providing future medicals. The authorized treating physician's recommended treatment was denied based on a UR decision. The trial court found the treatment necessary and held the employee was entitled to attorney's fees. In analyzing the statute, the Panel stated, "[T]he statute does not set out any specific factors to be considered by a trial court making the determination." However, the Panel further stated "the correct legal standard for determining the reasonableness of attorney's fees is to analyze the request using the ten factors set out in Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5(a)." *Id.* at *6-7 (internal citations omitted).

Here, Kroger argued that "failure to furnish" means "something egregious" and does not apply to denying medication based on a UR decision. The Court disagrees with Kroger's interpretation of "failure to furnish." The General Assembly did not define what constitutes a "failure to furnish" under (d)(1)(A) as it defined "wrongfully" under (d)(1)(B). Nor did the General Assembly exclude the right to attorney's fees under (d)(1)(A) when an employer "fails to furnish" based on a UR decision. A straightforward reading of the statute provides the Court *may* award reasonable fees and expenses when an employer fails to furnish medical benefits under a settlement.

In this case, the uncontroverted proof is that Mr. Diamond's treating physicians under his settlement referred Mr. Diamond for pain management and psychiatric treatment as a result of his injury. Dr. McCoy testified Mr. Diamond was referred for medication management because additional surgery was not an option. Mr. Diamond experienced difficulty at times as far back as 2018 obtaining his medication prescribed by Drs. McCoy and Morgan and again in 2019 when the carrier requested he use Kroger Pharmacy, which again rejected his prescriptions. Mr. Diamond felt he had to use IWP and MAC, which dispensed his medication while waiting on final approval or denial. Mr. Diamond testified he called his attorney requesting help with his medication many times. Eventually, Mr. Diamond's counsel had to file a Petition for Benefit Determination and bring this issue before the Court. Mr. Sposito's testimony indicated IWP only filled Mr. Diamond's prescriptions because Mr. Diamond was litigating his claim, and IWP expected payment from the carrier if the court found Mr. Diamond's medication reasonable and necessary. Thus, Mr. Diamond had to bring this action to seek medical benefits under his settlement to receive the required treatment. For these reasons, the Court finds Mr. Diamond's counsel is entitled to a reasonable fee and reasonable costs.

After the trial, Mr. Diamond's counsel filed a submission in support of attorney's fees and expenses. In response, Kroger filed a motion requesting a hearing citing *Hardin v. W.A. Kendall & Co., Inc.,* 2019 TN Wrk. Comp. App. Bd. LEXIS 23, at *7-8 (June 10, 2019). Based on *Hardin* and for good cause shown, the Court **grants** Kroger's motion for an evidentiary hearing on the reasonableness of the amount of Mr. Diamond's counsel's

fee application. The Court's legal assistant will provide the parties the Court's available dates for the hearing and provide any pre-hearing filing deadlines.

IT IS THEREFORE ORDERED as follows:

1. Kroger or its carrier shall provide Mr. Diamond's prescription medication as ordered by Drs. McCoy and Morgan from May 23, 2018, to the present.

2. Kroger or its carrier shall pay Mr. Diamond's outstanding balances to Injured Workers' Pharmacy and MAC Pharmaceuticals under the Tennessee medical fee schedule.

3. The Court reserves ruling on the amount of Mr. Diamond's counsel's reasonable attorneys' fee and costs until after the hearing, so this is not a final Order.

Entered **March 2, 2020.**

JUDGE AMBER E. LUTTRELL
Court of Workers' Compensation Claims

APPENDIX

Exhibits:

1. Prior Settlement Documents
2. Deposition Transcript of Dr. Dennis McCoy
3. Deposition Transcript of Dr. Jack Morgan
4. Deposition Transcript of Michael Sposito
5. Deposition Transcript of Tamika Russell
6. Deposition Transcript of Dr. Jeffrey Hazlewood
7. Deposition Transcript of Andrea Fitz (with attached late-filed exhibits)
8. Emails between counsel
9. Emails between Mr. Lambert and Mr. Sposito
10. IWP Reimbursement Worksheet
11. Employee's Answers to Employer's Second Set of Interrogatories
12. Emails between Mr. Lambert and IWP representative (collective)
13. Deposition Transcript of Richard Diamond (late-filed exhibit)

Technical record:

The Technical Record consists of twenty-four pleadings and is available in TNComp.

CERTIFICATE OF SERVICE

I certify that a copy of this Order was sent as indicated on March 2, 2020.

Name	Email	Service sent to:
Mark Lambert, Employee's Counsel	X	mlambert@calljmb.com robin@calljmb.com
S. Newton Anderson, Jared Renfroe, Employer's Counsel	X	sna@spicerfirm.com jrenfroe@spicerfirm.com

Penny Shrum, Clerk of Court
Court of Workers' Compensation Claims
WC.CourtClerk@tn.gov

Compensation Hearing Order Right to Appeal:

If you disagree with this Compensation Hearing Order, you may appeal to the Workers' Compensation Appeals Board or the Tennessee Supreme Court. To appeal to the Workers' Compensation Appeals Board, you must:

1. Complete the enclosed form entitled: "Notice of Appeal," and file the form with the Clerk of the Court of Workers' Compensation Claims *within thirty calendar days* of the date the compensation hearing order was filed. When filing the Notice of Appeal, you must serve a copy upon the opposing party (or attorney, if represented).

2. You must pay, via check, money order, or credit card, a **$75.00 filing fee** *within ten calendar days* after filing of the Notice of Appeal. Payments can be made in-person at any Bureau office or by U.S. mail, hand-delivery, or other delivery service. In the alternative, you may file an Affidavit of Indigency (form available on the Bureau's website or any Bureau office) seeking a waiver of the filing fee. You must file the fully-completed Affidavit of Indigency *within ten calendar days* of filing the Notice of Appeal. **Failure to timely pay the filing fee or file the Affidavit of Indigency will result in dismissal of your appeal.**

3. You bear the responsibility of ensuring a complete record on appeal. You may request from the court clerk the audio recording of the hearing for a $25.00 fee. A licensed court reporter must prepare a transcript and file it with the court clerk *within fifteen calendar days* of the filing the Notice of Appeal. Alternatively, you may file a statement of the evidence prepared jointly by both parties *within fifteen calendar days* of the filing of the Notice of Appeal. The statement of the evidence must convey a complete and accurate account of the hearing. The Workers' Compensation Judge must approve the statement of the evidence before the record is submitted to the Appeals Board. If the Appeals Board is called upon to review testimony or other proof concerning factual matters, the absence of a transcript or statement of the evidence can be a significant obstacle to meaningful appellate review.

4. After the Workers' Compensation Judge approves the record and the court clerk transmits it to the Appeals Board, a docketing notice will be sent to the parties. The appealing party has *fifteen calendar days* after the date of that notice to submit a brief to the Appeals Board. *See the Practices and Procedures of the Workers' Compensation Appeals Board.*

To appeal your case directly to the Tennessee Supreme Court, the Compensation Hearing Order must be final and you must comply with the Tennessee Rules of Appellate Procedure. If neither party timely files an appeal with the Appeals Board, the trial court's Order will become final by operation of law thirty calendar days after entry. *See* Tenn. Code Ann. § 50-6-239(c)(7).

For self-represented litigants: Help from an Ombudsman is available at 800-332-2667.

NOTICE OF APPEAL

Tennessee Bureau of Workers' Compensation
www.tn.gov/workforce/injuries-at-work/
wc.courtclerk@tn.gov | 1-800-332-2667

Docket No.: _____

State File No.: _____

Date of Injury: _____

_____
Employee

v.

_____
Employer

Notice is given that _____
[List name(s) of all appealing party(ies). Use separate sheet if necessary.]

appeals the following order(s) of the Tennessee Court of Workers' Compensation Claims to the Workers' Compensation Appeals Board (check one or more applicable boxes and include the date file-stamped on the first page of the order(s) being appealed):

☐ Expedited Hearing Order filed on _____ ☐ Motion Order filed on _____

☐ Compensation Order filed on_____ ☐ Other Order filed on_____

issued by Judge _____.

Statement of the Issues on Appeal

Provide a short and plain statement of the issues on appeal or basis for relief on appeal:

_____
_____
_____
_____

Parties

Appellant(s) (Requesting Party): _____ ☐ Employer ☐ Employee
Address: _____ Phone: _____
Email: _____
Attorney's Name: _____ BPR#: _____
Attorney's Email: _____ Phone: _____
Attorney's Address: _____

** Attach an additional sheet for each additional Appellant **

Employee Name: _____ Docket No.: _____ Date of Inj.: _____

Appellee(s) (Opposing Party): _____ ☐ Employer ☐ Employee
Appellee's Address: _____ Phone: _____
Email: _____
Attorney's Name: _____ BPR#: _____
Attorney's Email: _____ Phone: _____
Attorney's Address: _____

** Attach an additional sheet for each additional Appellee **

CERTIFICATE OF SERVICE

I, _____, certify that I have forwarded a true and exact copy of this Notice of Appeal by First Class mail, postage prepaid, or in any manner as described in Tennessee Compilation Rules & Regulations, Chapter 0800-02-21, to all parties and/or their attorneys in this case on this the _____ day of _____, 20 ____.

_____
[Signature of appellant or attorney for appellant]

Tennessee Bureau of Workers' Compensation
220 French Landing Drive, I-B
Nashville, TN 37243-1002
800-332-2667

AFFIDAVIT OF INDIGENCY

I, _____, having been duly sworn according to law, make oath that because of my poverty, I am unable to bear the costs of this appeal and request that the filing fee to appeal be waived. The following facts support my poverty.

1. Full Name: _____ 2. Address: _____

3. Telephone Number: _____ 4. Date of Birth: _____

5. Names and Ages of All Dependents:

_____ Relationship: _____

_____ Relationship: _____

_____ Relationship: _____

_____ Relationship: _____

6. I am employed by: _____

My employer's address is: _____

My employer's phone number is: _____

7. My present monthly household income, after federal income and social security taxes are deducted, is:

$ _____

8. I receive or expect to receive money from the following sources:

AFDC	$ _____ per month	beginning _____
SSI	$ _____ per month	beginning _____
Retirement	$ _____ per month	beginning _____
Disability	$ _____ per month	beginning _____
Unemployment	$ _____ per month	beginning _____
Worker's Comp.	$ _____ per month	beginning _____
Other	$ _____ per month	beginning _____

9. My expenses are:

Rent/House Payment	$ _____ per month	Medical/Dental	$ _____ per month
Groceries	$ _____ per month	Telephone	$ _____ per month
Electricity	$ _____ per month	School Supplies	$ _____ per month
Water	$ _____ per month	Clothing	$ _____ per month
Gas	$ _____ per month	Child Care	$ _____ per month
Transportation	$ _____ per month	Child Support	$ _____ per month
Car	$ _____ per month		
Other	$ _____ per month (describe: _____)		

10. Assets:

Automobile	$ _____	(FMV) _____
Checking/Savings Acct.	$ _____	
House	$ _____	(FMV) _____
Other	$ _____	Describe: _____

11. My debts are:

Amount Owed	To Whom
_____	_____
_____	_____
_____	_____
_____	_____

I hereby declare under the penalty of perjury that the foregoing answers are true, correct, and complete and that I am financially unable to pay the costs of this appeal.

_____
APPELLANT

Sworn and subscribed before me, a notary public, this

_____ day of _____, 20_____.

_____
NOTARY PUBLIC

My Commission Expires: _____