

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

P. P.

Opinion No. 01-08WC

v.

By: David J. Blythe, Esq.  
Contract Hearing Officer

State of Vermont,  
Office of the Attorney General

For: Patricia Moulton Powden  
Commissioner

State File No. J-22042

**FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER**

**I. INTRODUCTION**

Claimant's case effectively consists of determining which medications Claimant has been prescribed or is currently being prescribed in connection with her work-related injury are compensable. Claimant also seeks an award of attorney's fees and costs associated with this aspect of her claim.

**II. HEARING**

This matter came on for final evidentiary hearing on May 10, 2007 before David J. Blythe, Hearing Officer and designee of the Commissioner of Labor for this case. Claimant was present and was represented by Attorney Heidi Groff. Defendant State of Vermont was represented by Attorney Keith J. Kasper. At the hearing, Claimant presented her testimony and Defendant presented witness testimony from William Boucher, MD and Coleman Levin, MD (both by telephone).

**III. FINDINGS OF FACT**

*Stipulated Facts and Judicial Notice*

The parties stipulated to the following facts, which are here FOUND and which are here incorporated essentially as presented as paragraphs 1 through 8 in a written Stipulation dated May 10, 2007 ("Stipulation") by the parties:

1. Claimant suffered a compensable work-related injury on May 1, 1996.

2. On January 18, 2000, the parties came to a Form 14 Settlement Agreement leaving open medical benefits, including prescriptions, causally related to her work-related injuries.
3. On April 31[sic], 2003, Defendant filed a Form 27 discontinuing payment of medical benefits for all of Claimant's treatments except for pool therapy and Oxycontin.
4. On February 7, 2005, The Department [of Labor] issued an interim order requiring retroactive payment of the following medications: Morphine Sulfate, Effexor, Methylin Omeprazole and Aspirin.
5. Subsequently Defendant voluntarily agreed to pay for additional medications based upon the expert opinions it had received in this matter.
6. Remaining at issue in this case is Claimant's request for payment for the following medications: Amantadine, Trileptal, Kepra, Methylphenidate (Ritalin), Clonazepam, Lorazepam, Hydroxychloroquine (Plaquenil), Omeprazole (Prilosec), Lasix and Klorcon.
7. Claimant seeks payment for these outstanding contested medications (repayment to Claimant for the retail cost and she will reimburse her primary health insurer, Cigna directly), and, if successful, an award of attorney's fees and costs.
8. The parties agree to the submission of the following exhibits:
  - Joint Exhibit No. 1 Relevant medical records
  - Joint Exhibit No. 2 Preservation testimony of Dr. John Matthew, MD
9. At the hearing, Defendant conceded the compensability of the following medications: Topomax, Pregabalin (a.k.a Lyrica), Tegretal, Flouxetine (a.k.a Prozac) and Miralax/Glycolax.
10. The Commissioner takes judicial notice of the fact and content of all forms filed by either party with the Department prior to the time and date of the hearing.

*Additional Findings of Fact*

11. On May 1, 1996, Claimant injured her back while in the employ of the Defendant and in connection with her employment-related activities (the workplace injury). There is no dispute as to whether this is a compensable injury. In addition to her back injury, Claimant suffers from depression related to her workplace injury. *Stipulation.*

12. Claimant worked for Defendant for approximately ten years between 1990 and 2000 as an administrative assistant. She left Defendant's employ in 2000 due to pain from her workplace injury. *Claimant's testimony.*
13. At the time of the workplace injury, Claimant had several pre-existing medical conditions, including obesity, hypertension, diabetes mellitus, urinary urge and stress incontinence, gastrointestinal distress, hypothyroidism and edema. *Exhibit 1, Dr. Levin's report dated May 10, 2006.*
14. John Matthew, MD has been Claimant's primary treating physician for more than one year. He is board-certified in internal medicine and has been treating patients for over thirty four years. He frequently treats patients for chronic pain. Dr. Matthew has reviewed Claimant's medical records, including records provided to him by other medical providers, in connection with his treatment of Claimant and with his testimony. *Exhibit 2 at 3-6.*
15. Dr. Matthew and Dr. Levin both testified that prescribing medications to treat chronic pain and its related conditions frequently involves a trial-and-error process in order to determine which medications, or combinations of medications, will offer a patient (including patients such as Claimant) the best treatment. *Id. at 16-17; Dr. Levin's testimony.*
16. Claimant has undergone two invasive surgical procedures and continues to receive epidural blocks at three to four month intervals. Prior to the date of the hearing, the last epidural block was received in February 2007. *Claimant's testimony.*
17. Claimant's current (as of the date of the hearing) medical problems/conditions are
  - (a) back pain;
  - (b) radicular pain in her legs;
  - (c) depression and sleep problems;
  - (d) gastroesophageal reflux disease ("GERD");
  - (e) constipation;
  - (f) edema (swelling in her ankles); and
  - (g) conditions which are side-effects of the medications prescribed.

*Id.; Exhibit 1 generally.*

18. Claimant testified credibly that since she left her employment with Defendant she has been unable to work due to pain and the medical problems related to the workplace injury. She is currently unable to drive an automobile. *Id.*
19. Currently, the only narcotic medication Claimant takes (for her chronic pain) is Oxycodone, the compensability of which is not at issue. *Exhibit 2 at 11.*
20. Dr. Matthew and Dr. Boucher both testified that physicians commonly prescribe medications for purposes other than those officially recognized by the United States Food and Drug Administration (“FDA”). *Exhibit 2 at 37-38; Dr. Boucher’s testimony.*
21. Drs. Levin and Boucher both examined medical records in connection with their testimony. Dr. Boucher conducted an independent medical examination of Claimant on April 20, 2005. Dr. Levin neither personally examined nor treated Claimant. *Dr. Levin’s testimony; Dr. Boucher’s testimony.*

#### Amantadine

22. Dr. Matthew previously had prescribed Amantadine for Claimant’s chronic pain. She is not now taking Amantadine. *Exhibit 2 at 17-18.*
23. Amantadine is approved by FDA as an antiviral medicine for influenza and for Parkinson’s disease. *Id. at 18; Dr. Boucher’s testimony; Dr. Levin’s testimony.*
24. Dr. Matthew testified he prescribed Amantadine for Claimant’s chronic pain in part because of his own experience in prescribing it and, in part, based upon advice he received from another physician (a psychiatrist) that Amantadine is helpful in treating chronic pain. *Exhibit 2 at 17-19.*
25. Brian A. Erickson, MD, examined Claimant on behalf of Defendant in November 2005. Dr. Erickson testified that prescribing Amantadine to augment Oxycontin (which Claimant was taking at that time) was reasonable. *Exhibit 1 at 365-366.*
26. Dr. Levin testified that Amantadine has no efficacy for back pain and is not medically indicated for Claimant’s condition. *Dr. Levin’s testimony.*

#### Trileptal and Kepra

27. Trileptal and Kepra are both anti-epileptic (Dr. Matthew’s characterization) or anti-convulsant (Dr. Boucher’s characterization) medications. *Exhibit 2 at 12; Dr. Boucher’s testimony.* Dr. Matthew also referred to them as “seizure” medications. *Exhibit 2 at 12.*

28. Claimant had previously been prescribed and had taken a number of anti-seizure medications, including Clonazepam, Tegretol, Topomax and Neurontin. *Id.*
29. Dr. Matthew prescribed Trileptal and Kepra to treat Claimant's neuropathic pain, which he described as being pain which results when "something mechanically or chemically is bothering [a patient's] nerves." *Id. at 4, 13.*
30. Dr. Matthew also testified that he prescribed the Trileptal and Kepra to accompany the narcotic pain medication (presently Oxycodone). *Id. at 13-14.*
31. Dr. Boucher testified that Trileptal and Kepra are normally prescribed to treat seizures in adults, and that he had never seen them used to treat pain. *Dr. Boucher's testimony.*
32. Dr. Levin testified that he was aware that Kepra was used in chronic pain clinics as an adjunct to other medications, but that he did not believe that anti-convulsants such as Trileptal and Kepra were necessary for the treatment of chronic pain or depression for Claimant in particular. *Dr. Levin's testimony.*
33. Dr. Matthew acknowledged that Trileptal and Kepra are not approved by FDA for treatment of chronic pain, and that his prescribing them for Claimant is another "off-label" use. *Exhibit 2 at 15; see* Finding No. 20 above.
34. Dr. Matthew further testified that he had observed that Trileptal and Kepra have helped reduce Claimant's pain. He also testified that there is no doubt in his judgment that anti-convulsants such as Trileptal and Kepra are effective in treating chronic pain when used as adjuncts to narcotic medications. *Exhibit 2 at 16-17 and 26.*
35. Dr. Matthew strongly disagreed with Dr. Boucher's opinion (related to Dr. Matthew by counsel for Defendant during the deposition) that use of anti-seizure medications were not reasonable and necessary for Claimant's treatment. *Exhibit 2 at 15.*

#### Methylphenidate/Ritalin

36. Methylphenidate/Ritalin is a stimulant. Dr. Matthew prescribed Methylphenidate/Ritalin as an adjunct medication to treat Claimant's depression. *Id. at 19.*
37. Dr. Matthew testified that some patients being treated for depression don't respond to other medications until a stimulant is added to the treatment regimen. *Id. 19-21.*
38. Dr. Boucher testified that Methylphenidate/Ritalin is a common medication for treating major depression, ADHD and narcolepsy, but is not indicated for simple depression such as experienced by Claimant. He stated that it can cause sleep

deprivation, has the potential for addiction, and generally should only be prescribed by a psychiatrist. *Dr. Boucher's testimony.*

39. Dr. Levin described Methylphenidate/Ritalin as a central nervous system stimulant which can be used in treating clinical depression, but is not indicated for chronic pain and simple depression such as experienced by Claimant. *Dr. Levin's testimony.*
40. Dr. Matthew specifically testified that the addition of Methylphenidate/Ritalin to Claimant's medication regimen helped her functional status. *Exhibit 2 at 19.*

#### Clonazepam and Lorazepam

41. Clonazepam and Lorazepam are sedatives which are prescribed to help patients sleep. *Id. at 20.*
42. Dr. Matthew prescribed Clonazepam and Lorazepam for Claimant because her pain keeps her from sleeping. *Id. at 21-22.*
43. Dr. Matthew also noted that Clonazepam has some antidepressant effect. *Id.*
44. Dr. Boucher testified that Clonazepam and Lorazepam are not normally used to treat depression. *Dr. Boucher's testimony.*
45. Dr. Levin testified that Clonazepam and Lorazepam are normally prescribed to treat "true insomnia" but not for back pain. However, he also acknowledged that both are occasionally used as adjunctive medications in treating chronic pain. *Dr. Levin's testimony.*

#### Hydroxychloroquine (Plaquenil)

46. Hydroxychloroquine (Plaquenil) is an anti-malarial medication which is sometimes used to treat inflammatory arthritis. *Exhibit 2 at 23.*
47. Dr. Matthew could not connect the use of Hydroxychloroquine (Plaquenil) to the treatment of Claimant's conditions. *Id.*
48. Dr. Boucher testified that he could not see any reason to prescribe Hydroxychloroquine (Plaquenil) for Claimant's conditions. *Dr. Boucher's testimony.*

#### Omeprazole (Prilosec)

49. Omeprazole (Prilosec) is a medication which treats gastroesophageal reflux disease (GERD) and reflux esophagitis. *Exhibit 2 at 9.*

50. Dr. Matthew has diagnosed Claimant as suffering from reflux esophagitis, but could not specifically relate that condition to her workplace injury or to the medications currently being prescribed for her compensable injuries. *Id.*
51. Dr. Levin testified that based upon his review of Claimant's medical history, including records relating to her medical condition prior to the date of injury, he concluded that the reflux esophagitis is not causally related to the workplace injuries. *Dr. Levin's testimony.*

#### Lasix and Klor-Con

52. Lasix is a diuretic which is prescribed to reduce edema (fluid build-up). *Dr. Boucher's testimony.*
53. Dr. Matthew prescribed Lasix to treat Claimant's edema in her ankles. He testified that the swelling in Claimant's ankles was aggravated by her weight gain due to inactivity following the workplace injury. *Exhibit 2 at 26-27 and 31-32.*
54. Although she was obese prior to May 1996, Claimant did not take diuretics prior to her workplace injury. *Id. at 32.*
55. Klor-Con is a potassium supplement. *Id. at 25; Dr. Levin's testimony.*
56. Dr. Matthew prescribed Klor-Con in connection with Lasix because diuretics such as Lasix cause the kidneys to "waste" potassium. *Id.*
57. Drs. Boucher and Levin agreed with Dr. Matthew's description of Klor-Con and its use in connection with diuretic medications. *Dr. Boucher's testimony; Dr. Levin's testimony.*

#### CONCLUSIONS OF LAW

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984); *Goodwin v. Fairbanks, Morse & Co.*, 123 Vt. 161, 166 (1962); *Nutbrown v. Roadway Express*, Opinion No. 2-93, at 4 (June 7, 1993).
2. In this case, Claimant has the burden of establishing that the proposed treatment is both causally related to the May 1, 1996 workplace injury and that the treatment is necessary and reasonable. *Stevens v. Burlington Rent-All, Inc.*, Opinion No. 66-96 (November 20, 1996).

3. In cases where the Commissioner must choose among conflicting medical opinions with regard to Claimant's condition, the following factors are considered: 1) the nature of treatment and length of time there has been a patient-provider relationship; 2) whether the expert examined all pertinent records; 3) the clarity, thoroughness and objective support underlying the opinion; 4) the comprehensiveness of the evaluation; and 5) the qualifications of the experts, including training and experience. See *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003).
4. As Claimant's treating physician, Dr. Matthew is in the best position to assess the efficacy of medications prescribed for the conditions for which he is treating Claimant. For those conditions causally related to the workplace injury, Dr. Matthew's professional opinions are given considerable weight.
5. It is not unreasonable for a treating physician to try a variety of medications, and to do so in different combinations, in order to determine the best treatment of a particular compensable condition. See *Finding of Fact No. 15, supra*. So long as the medication bears a reasonable relationship to the condition, the cost of that medication is compensable.
6. Whether or not a particular medication is listed by FDA for the treatment of a specific medical condition, or is listed as such in any particular medical text or reference manual, is not dispositive of whether or not the cost that medication is compensable in connection with the treatment of a particular medical condition. Such listings may have evidentiary value, and if so are to be given appropriate weight by the finder of fact in determining the compensability of the cost of such medications.
7. The test of whether the cost of a particular medication is compensable is not a post-facto assessment of whether or not it actually achieved the purpose for which it was prescribed. To so require would place an unreasonable burden on a claimant or a physician, and could have the effect of discouraging a physician from trying different, but otherwise reasonable, treatment regimes in treating a compensable condition. Rather, the appropriate means of determining whether or not the cost of a particular medication is compensable is a determination of whether the prescription and use of that medication is reasonable and necessary under the circumstances of the condition and its treatment. In making that determination, the Commissioner may consider, *inter alia*, the evidence offered by the prescribing provider for the basis of the decision to prescribe a particular medication, the prescribing provider's prior experience with the medication, the listed uses of the medication, any professional literature or studies relating to the medication, materials from the manufacturer or supplier of the medication, testimony from other qualified witnesses, the actual effect of the medication in a particular claimant's case, and other evidence which the Commissioner finds relevant.



Amantadine

8. Based upon the foregoing, Claimant has met her burden of establishing that the prescription and use of Amantadine is reasonable and necessary, and therefore the expense of Amantadine for the treatment of the workplace injury is compensable.

Trileptal and Kepra

9. Based upon the foregoing, Claimant has met her burden of establishing that the prescription and use of Trilepta and Kepra is reasonable and necessary, and therefore the expense of Trileptal and Kepra for the treatment of the workplace injury is compensable.

Methylphenidate/Ritalin

10. Based upon the foregoing, Claimant has met her burden of establishing that the prescription and use of Methylphenidate/Ritalin is reasonable and necessary, and therefore the expense of Methylphenidate/Ritalin for the treatment of the workplace injury is compensable.

Clonazepam and Lorazepam

11. Based upon the foregoing, Claimant has met her burden of establishing that the prescription and use of Clonazepam and Lorazepam is reasonable and necessary, and therefore the expense of Clonazepam and Lorazepam for the treatment of the workplace injury is compensable.

Hydroxychloroquine (Plaquenil)

12. Based upon the foregoing, Claimant has not met her burden of establishing that the prescription and use of Hydroxychloroquine (Plaquenil) is reasonable and necessary, and therefore the expense of Hydroxychloroquine (Plaquenil) for the treatment of the workplace injury is not compensable.

Omeprazole (Prilosec)

13. Based upon the foregoing, Claimant has not met her burden of establishing that the prescription and use of Omeprazole (Prilosec) is reasonable and necessary, and therefore the expense of Omeprazole (Prilosec) for the treatment of the workplace injury is not compensable.

Lasix and Klor-Con

14. Based upon the foregoing, Claimant has met her burden of establishing that the prescription and use of Lasix and Klor-Con is reasonable and necessary, and therefore the expense of Lasix and Klor-Con for the treatment of the workplace injury is compensable.

Attorney's Fees and Costs

15. Under WC Rule 10 and 21 VSA §678(a), the Commissioner, in her discretion, may award reasonable attorney's fees to the prevailing party. Claimant's attorney has submitted an itemized statement of services rendered showing 47.9 hours of professional services and costs of \$778.27. This amount includes the fee paid to Dr. Matthew for his deposition. Dr. Matthew billed one and one-half hours of his time at the rate of \$500.00 per hour. However, Rule 40 limits the awardable cost of expert witness deposition testimony to \$300.00 per hour. Therefore, costs of Dr. Matthew's deposition in the amount of \$450.00 are recoverable if awarded. Under Rule 10.1210, the award for legal services rendered on an hourly basis is limited to \$90.00 per hour. At the allowed rate, the fees for professional services in this case (if fully compensable) would be \$4,311.00. Claimant's total request for attorney's fees and costs is therefore \$5,089.27.
16. However, Claimant has not prevailed on all of her claims. Because the body of medical and other evidence is, in large part, common to all issues, it is reasonable and within the Commissioner's discretion to conclude that Claimant is entitled to recover attorney's fees in relative proportion to those claims upon which Claimant has prevailed.

17. Claimant sought a determination that the medications prescribed and used to treat a total of seven medical conditions (some involving two medications) were compensable. Those conditions, and the respective medications, are:

Chronic pain .....	Amantadine
Neuropathic pain .....	Trilepta and Kepra
Depression .....	Methylphenidine/Ritalin
Sleep problems .....	Clonazepam and Lorazepam
General pain.....	Hydroxychloroquine (Plaquenil)
Gastroesophageal reflux disease .....	Omeprazole (Prilosec)
Edema (ankle swelling) .....	Lasix and Klor-Con

Of these seven conditions, Claimant has established the compensability of the medications prescribed and used to treat five. Therefore, Claimant is awarded five-sevenths of the requested attorney’s fees, in the amount of \$3,079.29. Claimant’s request for costs in the amount of \$778.27 (as calculated by *Conclusion of Law No. 15* above), is granted in full.

18. On April 22, 2007, the Commissioner approved an attorney’s lien pursuant to Rule 10(2)(B) in favor of Claimant’s counsel. Pursuant to the Agreement between Claimant and Claimant’s counsel (“Agreement”), which Agreement was approved by the Commissioner when granting the lien, Claimant’s counsel may choose between the attorney’s fees awarded or 25% of the amounts awarded. Because this Order does not include calculation of the amounts actually awarded, no specific order is made as to which option under the Agreement Claimant’s counsel may exercise.

## ORDER

Based upon the foregoing, it is hereby ORDERED as follows:

1. Defendant is responsible for the payment of those medications the prescription and use of which have been found to be compensable. Those medications are: Amantadine, Trileptal, Kepra, Methylphenidate (Ritalin), Clonazepam, Lorazepam, Lasix and Klor-con. Defendant shall pay to Claimant those amounts which Claimant documents for the costs of those medications.
2. Claimant, having substantially prevailed on five of her seven claims (as determined by the Commissioner in her discretion), is entitled to an award of attorney's fees in the amount of \$3,079.29 and of costs in the amount of \$778.27, both of which are reasonable.
3. Claimant is also entitled to statutory interest at the rate of 12% per annum on the amounts invoiced for those medications which are compensable, interest to accrue from the date each such invoice was payable or, in the instance in which Claimant actually paid for such medications and is seeking reimbursement, from the date upon which Claimant made such payment.

Dated at Montpelier, Vermont this 1<sup>st</sup> day of February 2008.

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Patricia Moulton Powden  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.