OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-664-891-004

ISSUES

- Did Claimant prove that her current opioid medications are reasonably needed notwithstanding a previous Order of Administrative Law Judge Cannici finding that Claimant should be weaned from opioids?

FINDINGS OF FACT

1. Claimant suffered admitted injuries August 28, 2005. She initially injured her left elbow when she tripped and fell at work. Claimant developed Complex Regional Pain Syndrome (CRPS) in her arm, which eventually spread to her legs and back.

2. Because of her severe chronic pain, Claimant was adjudicated permanently and totally disabled. Respondents filed a Final Admission of Liability admitting for PTD benefits and medical benefits after MMI. The parties later settled the indemnity portion of the claim, but left medical benefits open, subject to Respondents' right to contest the reasonable necessity of specific treatment.

3. Claimant treated with Dr. Reusswig until he passed away. She then started seeing Dr. Reusswig's partner, Dr. Patel. In 2019, Dr. Patel resigned as Claimant's ATP, and her care was transferred to Dr. Paul Leo, a pain management specialist.

4. Claimant has two implanted spinal cord stimulators (SCS) for pain relief, one in the lumbar spine to target the leg pain, and one in the cervical spine to cover her arm pain.

5. In 2020, Respondents applied for a hearing seeking "a judicial determination as to what is reasonable and necessary medical care, including Claimant's need to attend a detoxification facility," with the goal of "weaning" Claimant off opioids.

6. A hearing was held before Judge Peter J. Cannici on January 28, 2021. Because Respondents were not disputing Claimant's entitlement to medications other than opioids, Claimant had the burden of proof regarding reasonable necessity.

7. On April 5, 2021, Administrative Law Judge Cannici issued Findings of Fact, Conclusions of Law and Order (FFCLO) ordering that "Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo." Respondents were also ordered to cover Ketamine infusions as reasonably necessary pain management treatment. Judge Cannici found that Ketamine would "reduce Claimant's reliance on opioid medications and thus aid in the weaning process."

8. Both parties appealed to the Industrial Claim Appeals Office (ICAO). The Panel affirmed the determination that Ketamine was reasonably needed and causally related to the work injury. However, the Panel determined the decision was internally

inconsistent and ambiguous whether "weaning" meant that opioids should be entirely eliminated or simply reduced. Consequently, the Panel set aside the portion of the FFCLO regarding "weaning" and remanded the case for additional findings and a new order.

9. On February 28, 2023, Judge Cannici issued an FFCLO on Remand finding that "Claimant requires a reduction of opioids until her use of the medication ceases. Accordingly . . . her use of opioids is only reasonable and necessary to treat her August 28, 2005 industrial injuries for a six-month weaning period." Based on these findings, Judge Cannici ordered that, "Claimant shall receive opioid medications for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim."

10. Claimant appealed the February 28, 2023 FFCLO to the ICAO. The Panel held that imposing a time limit on the weaning process exceeded the scope of the remand order. The Panel further held that the six-month deadline was not supported by substantial evidence, because the issue had not been raised at hearing and no evidence was presented regarding the length of the weaning process. Based on these findings, the Panel set aside the portions of the order regarding the "six-month limitation on the weaning period." The Panel otherwise affirmed the remand order.

11. The Court of Appeals affirmed the Panel's decision on June 6, 2024. The court agreed that the six-month limitation exceeded the scope of the remand order. The court also noted,

> [T]here is a possibility that [Claimant] will not be weaned from opioid medications because although the ALJ's initial order provided that [Claimant] "shall be weaned from opioids as directed by her current ATP," her current ATP testified that he did not believe she needed to be completely weaned from opioids. But employer is not without a remedy; it may file another application for hearing . . . or request a utilization review.

12. Respondents filed the current Application for Hearing on October 21, 2024, endorsing medical benefits, issue and claim preclusion, and penalties against Claimant for failure to wean from her medications.

13. Respondents' penalty claim was denied by summary judgment on February 5, 2025. That same Order denied Claimant's motions for summary judgment on the issue of whether opioids are reasonably needed and the issue of attorney fees for endorsing unripe issues.

14. The April 5, 2021 FFCLO ordered Respondents to cover Ketamine infusions as reasonably necessary pain management treatment. That portion of the FFCLO was upheld on appeal.

15. The current evidentiary record contains Dr. Leo's medical records dating to January 25, 2022. Since that time, Dr. Leo has seen Claimant at approximately monthly intervals to monitor and adjust her medications, as necessary.

16. As of January 25, 2022, Claimant was being prescribed Nucynta ER 100 mg twice daily and oxycodone 5mg three times daily. Per Dr. Leo, that combination has a morphine milligram equivalent (MME) dose of 102.5.[1] Claimant had recently received a Ketamine infusion which helped her with her pain, and had another infusion scheduled the following day. As a result, Claimant wanted to start tapering the oxycodone. Dr. Leo reduced the oxycodone prescription to 5 mg twice daily.

17. Dr. Leo's records document that the Ketamine infusions reduce Claimant's pain for approximately three to four weeks.

18. Claimant's cervical SCS started malfunctioning in 2022, with only 6 of 16 electrodes working as of May 2022. The Boston Scientific representative adjusted the programming to try and maximize performance of the remaining leads. These adjustments were beneficial for a few months.

19. On November 25, 2022, Dr. Leo noted Claimant was doing well with her current medications and regular Ketamine infusions.

20. On January 19, 2023, Claimant told Dr. Leo she was ready to resume tapering opioids and wanted to decrease the Nucynta. Dr. Leo reduced the daily Nucynta dose by 25%. For unknown reasons, Dr. Leo neglected to update the MME level listed in Claimant's chart, even though she had reduced Nucynta by 25% and oxycodone by 33% since January 2022.

21. Claimant was forced to stop the Ketamine treatment in April 2023 because the infusion clinic abruptly closed, and it took several months to find a replacement clinic.

22. On July 25, 2023, Claimant reported the SCS was not covering her arm pain. The Boston Scientific rep interrogated the device and noted additional problems with the leads. Dr. Leo ordered x-rays to confirm whether the device was still in good position. Claimant was still looking for a new Ketamine clinic. She had purchased a TENS unit to help with the increased arm pain. Dr. Leo prescribed Lidocaine patches.

23. Further testing of the cervical SCS in October 2023 showed it was essentially nonfunctional and needed to be replaced. Dr. Leo referred Claimant to Dr. Beasley, the surgeon who had placed the cervical SCS, to consider replacement options. Claimant had found a Ketamine provider and was working to get Respondents to cover the treatment again.

24. Claimant saw Dr. Beasley in November 2023. Dr. Beasley did not think revising the SCS would be successful because he was not confident he could get the new leads and paddle into the same position.

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[1] Judge Cannici previously found that each opioid medication has a conversion to MMI, which serves as a standard to compare the equivalent strength of different medications. Judge Cannici found that Dr. Patel had wanted to get Claimant down to "MME=90," and Dr. Olsen had opined "it is generally accepted that the MME levels should be no higher than 60-90."

25. On November 28, 2023, Dr. Leo told Claimant he would try to speak with a different spine surgeon to see what they may recommend. Respondents still had not approved the resumption of Ketamine treatment.

26. At her January 24, 2024 appointment with Dr. Leo, Claimant reported she had been without Nucynta for a week because Respondents had refused authorization. As a result, her pain had flared to 8/10. Dr. Leo wrote the prescription for Nucynta again, and stated "WC stopping it is directly against the 2022 guidelines. There is no medical indication for stopping this medication as it is working as well or better for her than a full mu agonist and has a lower side effect profile with a lower chance of addiction." Dr. Leo increased the oxycodone dose "for additional pain coverage if Nucynta is rejected [again]."

27. On March 19, 2024, Dr. Leo documented that Respondents had "finally" approved Ketamine therapy, but Claimant had not been able to pursue the treatment because she had recently gotten divorced and was temporarily living with friends. She planned to restart Ketamine once her living situation stabilized.

28. Dr. Leo Lombardo performed a peer review of Claimant's opioid prescriptions in April 2024. He reviewed published literature and the Colorado MTGs regarding opioids for chronic pain. Dr. Lombardo acknowledged that opioid medications pose serious risks and must be used carefully. However, Dr. Lombardo noted that medication improved Claimant's tolerance for ambulation, activities of daily living outside the home, and a home exercise program. An opioid agreement was in place and the PDMP is checked at each visit. Therefore, he opined that the prescriptions for Nucynta and oxycodone were reasonably necessary and should be approved.

29. In September 2024, Dr. Leo noted that Claimant was living in Nederland and had no transportation to the Ketamine clinic. However, she was in the process of closing on a new home and hoped to restart Ketamine treatment soon.

30. Claimant moved to her new home in mid-October 2024. She was planning to reestablish Ketamine therapy and be evaluated for replacement of the cervical SCS. Dr. Leo documented that Claimant's arm pain had increased to 7-8/10 since the SCS stopped working. He also noted that her pain level increased when she was without the proper pain medications, and she had trouble functioning in daily life. She occasionally needed assistance from her daughter to use the restroom because of severe pain.

31. Dr. Stephen Lindenbaum issued a peer review report on November 7, 2024, regarding the Nucynta and oxycodone prescriptions. Dr. Lindenbaum noted,

> [T]his is a claimant with very severe disease. She has complex regional pain syndrome involving 3 limbs. She has both a lumbar spine stimulator and a cervical stimulator which is presently nonfunctioning because of broken leads. . . . The requested RXs are the standard of care in chronic pain patients with one long-acting opiate (Nucynta) and the other short acting opiate (Percocet) for breakthrough pain. . . . The Claimant is able to

> maintain her household independently with the use of these meds. Without them she would be bedridden. [Dr. Leo] does monthly calls and sees her every 3 months for [ ] urinalysis which has been concordant with her meds. He also does monthly PDMP checks.

Dr. Lindenbaum certified Nucynta and oxycodone as medically necessary.

32. The most recent report in evidence from Dr. Leo is from November 26, 2024. Dr. Leo opined,

> [Nucynta and oxycodone] continue to help her significantly, improving her pain from 8-9/10 to 4-5/10, allowing her to function through the day. She may have a greater need for medications because her cervical spinal cord stimulator is no longer [working] and may be revised when she has a consultation with Dr. Posely.

33. Dr. Hilary Apert performed another peer review of the Nucynta and oxycodone prescriptions in December 2024. Dr. Alpert wrote,

> [T]he claimant is stable with her current medications and her medications help her significantly, improving her pain from 8-9/10 to 4-5/10, allowing her to function throughout the day. It is further noted that the claimant's PDMP and UA were . . . consistent with prescribed medications and the 5 A's were reviewed. . . . Therefore, oxycodone . . . [and] Nucynta [are] medically necessary.

34. Dr. Nicolas Olsen has performed multiple IMEs and record reviews for Respondents since 2012. In 2020, Dr. Olsen opined that Claimant was a "poor candidate for ongoing opioid pain management," and recommended that opioids be terminated through an in-patient detoxification program. He also opined that Ketamine was not reasonably necessary.

35. On January 9, 2025, Dr. Olsen issued a report "to address whether Dr. Leo has made a reasonable attempt to completely wean [Claimant] off of her medications." Dr. Olsen noted that Nucynta and oxycodone had been reduced but the process had stalled and subsequently the medications were increased. As a result, Dr. Olsen concluded, "[w]hile it appeared she was making progress weaning medications, she eventually returned to oxycodone . . . four times a day. This was a doubling of her prior dose. Dr. Leo has not made reasonable attempts to try and wean [Claimant] off of medications as recommended by ALJ Cannici." Dr. Olsen did not comment on the fact he had increased the oxycodone prescription because Respondents denied authorization or Nucynta. Nor did he mention that Claimant's cervical SCS is no longer working.

36. Dr. Olsen maintained his belief that Claimant "should be fully weaned off her medications," and opined this can be accomplished in three to four months, after which time the medication would no longer be considered reasonable and necessary.

37. Dr. Olsen testified at hearing consistent with his report. He reiterated that Claimant should be completely weaned from opioids and that such weaning can be accomplished in four months. Specifically, Dr. Olsen stated during the first month, Claimant's Nucynta can be reduced to two times per day and the oxycodone down to three times per day. Following the second month, Claimant's Nucynta can be reduced to one time per day and her oxycodone to twice a day. On the third month, Claimant can be completely weaned off her Nucynta and the oxycodone be reduced to one time per day. Finally, during the fourth month, Claimant can be completely weaned off her narcotic medications.

38. Claimant testified that oxycodone and Nucynta help her function throughout the day. The medications decrease her pain and help her function. There have been times when Respondents did not authorize her medications timely, and she had to go without them. The result was that her pain increased, she was bedridden, and her daughter had to help her. She testified that her pain worsened after she had to stop Ketamine treatment, and when her cervical stimulator stopped working. These circumstances led to an increase in her medication use. Claimant has maintained her current medication usage since then and is hoping to have her stimulator situation addressed soon.

39. Claimant's testimony is credible.

40. The opinions of Dr. Leo, Dr. Lombardo, Dr. Lindenbaum, and Dr. Alpert regarding the reasonable necessity of Claimant's current medications are credible and persuasive.

41. Dr. Olsen's opinions that Dr. Leo has made no reasonable attempts to wean Claimant from opioids and that she should be completely weaned in four months are not persuasive. Dr. Olsen failed to account for the deterioration and eventual failure of Claimant's cervical SCS. Nor did Dr. Olsen address the prolonged disruption in the Ketamine infusion treatment. Additionally, Dr. Olsen did not consider the multiple recent peer reviews that all agreed Claimant's current opioids are reasonably needed.

42. Claimant proved that the opioid medications currently being prescribed by Dr. Leo are reasonably needed. Claimant proved the pause in the weaning process was reasonably needed and that no specific time frame for resumption or completion of weaning can be determined at this time.

43. Claimant incurred costs in connection with the prior litigation before Judge Cannici regarding opioid medications. Because Claimant ultimately prevailed on those issues, she is entitled to reimbursement of costs pursuant to § 8-42-101(5). Claimant submitted receipts of $1,101.00 for Dr. Leo's deposition and $450.50 for the deposition transcript. Respondents did not dispute these receipts or Claimant's entitlement to reimbursement of costs.

CONCLUSIONS OF LAW

A. Opioid medications

Respondents argue that "ALJ Cannici's second FFCLO mandating that Claimant be completely weaned off her opiate medications is a final order . . . and based on the doctrine of issue preclusion, the issue of whether Claimant needs to be completely weaned off opiate medications cannot be relitigated."

Issue preclusion is an equitable doctrine that bars relitigating an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78 (Colo. 1999). The doctrine of issue preclusion has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). In *Sunny Acres*, the court held that issue preclusion bars relitigation of an issues if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity to a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id*. at 47. Issue preclusion is an affirmative defense, which must be proved by a preponderance of the evidence. CRCP 8(c); *Martinez v. The Home Depot*, W.C. No. 4-490-891 (ICAO, March 18, 2004).

I agree with Respondents that the requirements for issue preclusion are satisfied with respect to Judge Cannici's findings that "Claimant requires a reduction of opioids until her use of the medications ceases," and "Claimant has established that her use of opioids is only reasonable and necessary for a [ ] weaning period." Therefore, absent reopening,[2] those findings are binding.

However, the specific parameters of the weaning process cannot be the subject of issue preclusion because the portion of the FFCLO imposing a time limit was reversed on appeal. Accordingly, there is no binding determination regarding details such as when the weaning process should start or how long it should take. Nor is there any persuasive reason why an "appropriate" weaning process must proceed in a linear fashion despite new developments occurring in the four years since the January 2021 hearing.

Ultimately, it is Claimant's burden to prove that the treatment she seeks is reasonably needed to relieve the effects of her injury and prevent deterioration of her condition, in the context of prior rulings in her case. *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988); *Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved the opioid medications being prescribed by Dr. Leo are reasonably needed. The opinions of Dr. Leo, Dr. Lombardo, Dr. Lindenbaum, and Dr. Alpert regarding the reasonable necessity of Claimant's current medications are credible and persuasive. Claimant's testimony is credible. Dr. Olsen's opinion that Dr. Leo made no reasonable attempt to wean Claimant from opioids is not persuasive. Claimant started

[2] Reopening has not been endorsed and is not an issue for this hearing.

weaning from opioids in 2022 and significantly reduced her daily dosage of both Nucynta and oxycodone. But the process was interrupted by closure of the Ketamine clinic and difficulty finding a new provider. Judge Cannici had previously found that Ketamine infusions would be a critical component of the weaning process, which proved to be the case. Therefore, one would naturally expect a suspension of the weaning process when Claimant lost access to the Ketamine treatment. The difficulties related to Ketamine treatment were subsequently compounded by the deterioration and eventual failure of Claimant's cervical SCS. Neither situation was anticipated by Judge Cannici's FFCLO. The preponderance of persuasive evidence shows that a pause in Claimant's weaning process was reasonably needed and appropriate under the circumstances.

Claimant proved that no specific time frame for resumption or completion of the weaning process can be determined at this time. Dr. Olsen's opinion that Claimant should be completely weaned in four months is not persuasive because it does account for uncertainties regarding when and whether Claimant will be able to resume Ketamine treatment and have her cervical SCS replaced. The appropriate timeframe for weaning will be heavily influenced by these future developments. But because these things have not yet occurred, it would be speculative and arbitrary to impose a specific time limit at this juncture.

B. Ripeness – attorney fees

Section 8-43-211(3) provides that any party who requests a hearing on issues that are not ripe for adjudication shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing.

"An issue is ripe for hearing when it is real, immediate, and fit for adjudication." *Youngs v. Industrial Claim Appeals Office*, 297 P.2d 964, 969 (Colo. App. 2012). The term "fit for adjudication" means there is no "legal impediment" to immediate adjudication of an issue. *E.g., Deane v. Regis Corporation*, W.C. No. 4-664-891-001 (ICAO, December 21, 2021). Lack of ripeness is a narrow concept, and the instances in which a court has found an issue to be unripe are quite rare. The most common scenarios in which issues were deemed unripe involved issues that were the subject of pending appeals. For example, in *BCW Enterprises, Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997), the court held that a claim for penalties based on an allegedly "bad faith appeal" was not ripe while the appeal was still pending. *See also, Youngs v. Industrial Claim Appeals Office*, 297 F.3d 964 (Colo. App. 2012) (petition to reopen an order denying PTD was unripe while an appeal of the order was still pending); *Blundell v. Final Order Startek USA Inc.*, W.C. No. 4-842-550-05 (ICAO, April 9, 2015) (attorney penalized for filing an AFH to "appeal" prior orders that were not legally subject to appeal).

Claimant argues that Respondents' penalty claim is not ripe because "Respondents did not have an order ordering Claimant to wean herself off opioids and did not have a date by which such weaning was to be completed." However, Claimant's argument confuses the concept of ripeness with the merits of underlying issue or claim. An issue can be "ripe" for hearing even though it lacks merit. *E.g., Younger v. Merritt Equipment Company*, W.C. No. 4-326-355 (ICAO, December 30, 2009) ("an issue that

lacks merit does not necessarily lack ripeness. The two concepts are distinct, and a frivolous or meritless claim may nonetheless be ripe for adjudication"). Here, there was no legal impediment to bringing the claim for penalties, and the issue was therefore ripe for determination. Respondents' penalty claim was based on their interpretation of Judge Cannici's order regarding weaning from opioids. Although I ultimately did not agree with Respondents' interpretation, that does not mean the issue was not ripe. Judge Cannici's order had become final when the Application for Hearing was filed, and there was no legal impediment to raising a claim for an alleged violation of that order.

Claimant also argues that ongoing use of opioids is not ripe for adjudication without an opinion "from the treating physician, Dr. Leo, stating that Claimant's use is not reasonable or necessary." The ICAO previously rejected essentially the same argument earlier in the case. *Deane v. Regis Corporation*, W.C. No. 4-664-891-001 (ICAO, December 21, 2021) ("claimant's assertion that an ALJ is without authority to rule in regard to a medical treatment that is not proposed by an authorized treating physician is incorrect."). There is no meaningful distinction between the ripeness issue raised by Claimant regarding the opioids in this hearing and the argument rejected by the Panel's in its December 21, 2021 Order.

It is well-established that even where the respondents admit for a general award of medical benefits after MMI, they retain the right to dispute whether any specific treatment is reasonably needed or causally related to the work injury. *E.g., Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988); *Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003). Claimant has cited no case law, and I am aware of none, which holds that the respondents must have an opinion from an ATP before they can dispute specific treatment. Indeed, such a requirement would essentially shift at least the burden of production to the respondents, when in fact it is the claimant's burden to prove entitlement to disputed treatment by a preponderance of the evidence.

C. Reimbursement of litigation costs

Section 8-42-101(5) provides that when any party requests a hearing on medical benefits after MMI that have been recommended by an ATP, and the contested benefit is subsequently awarded after hearing, "the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit."

As found, Claimant incurred costs in connection with the prior litigation before Judge Cannici regarding opioid medications. Because Claimant ultimately prevailed on those issues, she is entitled to reimbursement of costs under § 8-42-101(5). Claimant submitted receipts of $1,101.00 for Dr. Leo's deposition and $450.50 for the deposition transcript. Respondents did not dispute these receipts or Claimant's entitlement to reimbursement of costs.

ORDER

It is therefore ordered that:

1. Insurer shall pay for Nucynta and oxycodone prescribed by Dr. Leo.

2. Claimant's claim for attorney fees against Respondents for requesting a hearing on unripe issues is denied and dismissed.

3. Insurer shall pay Claimant $1,551.50 for reimbursement of litigation costs in connection with the prior hearing before Judge Cannici.

4. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 2, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts