



Medical Notes

Duplication of Treatment — Muscular Back Pain

— By Daniel Mangum, D.O.

The number of treatment options for non-specific muscular back pain, or that for strains and sprains, is truly impressive. There seems to be no rival in any other area of medicine that can match the enormity and diversity of treatments for any other general and common condition.

The question is often raised not just about the need or appropriateness of these treatments, but also about the use of many treatments at the exact same time. Is this ever reasonable, or is it often duplication of care so similar it should never be justified?

Unfortunately, the answer is not discovered within the medical literature. A quality study should involve a reasonable number of individuals (at least 100) randomly assigned to treatment groups and care that is blinded to both the patient and the provider, i.e. double-blinded. Most studies for back pain are small, non-randomized, and rarely blinded. Individuals often know and seek a specific treatment and providers and patients both almost always know if they are in the active or placebo group if even one exists. For many treatments there are often very few such studies in support of a single treatment alone, and none showing superiority of one treatment over another. A quality study comparing combined treatments is non-existent.

Attempts have been made to help wade through this cornucopia of treatments by different organizations. Worrisome is that some associations may have significant bias and conflict of interest with success of their profession and membership directly related to the amount and frequency of such treatment they often recommend and provide at the same time.

There have been independent groups without such vested interest that have also provided guidelines or algorithms for care. An example of this can be found in the *Annals of Internal Medicine* in 2007¹. This covered both acute and chronic back pain. For acute pain, several common treatments were rated². The best evidence for treatment (A rated) was the use of anti-inflammatory medicine and muscle relaxants, as well as avoiding bed rest. These three

treatments are often employed together and is not duplication of care nor controversial.

The use of manipulation or adjustments (B rated) was next listed. Again, most people would agree that adding adjustments to medicines is not a duplication of care and is more complimentary to the treatment program.

In this guideline for acute pain, all other care either had no clear evidence of support, or was thought not indicated. Acupuncture, physical agents and modalities like electrical stimulation and ultrasound all were given the worse D rating, yet these are frequently used today, often all together and not infrequently with adjustments at the same time. The treatments alone are questionable, but adding these passive treatments upon other passive treatment is generally inappropriate due to a variation of soft tissue passive care, a duplication of similar kinds of service.

After the acute phase, exercise should be added (A rating) while the value of adjustment providing long term benefits at this point is lacking good evidence (C rating) yet once again both are often provided for weeks or months and frequently without justification and discussion in the records. Here it is not duplication (one is active, the other passive) but it may not be appropriate. Other passive care outside the acute phase is not appropriate per this guideline, yet often again it is done frequently it seems.

There may be exceptions to allow layering of passive care if careful thought and explanation by the treating provider is documented. A large person with tense or tight muscles may benefit from warm packs or massage prior to adjustment attempts. Perhaps ultrasound or electrical stimulation can do the same although it seems dubious. The problem often arises that there is usually no discussion on the reason one or more is added, and once added, it seems frequently never to change with or without clinical improvement and extend well beyond the acute phase of care. Without careful explanation such

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combined use of care should generally not be allowed in my opinion.

Stacking of various therapies is problematic for one other very important reason. If someone is improving, which care then is the most helpful? If not improving or feeling worse, which care is not working or is actually harmful? It is nearly impossible to make such determination in this situation, and is another reason not to recommend multiple simultaneous treatments.

Ultimately, no matter the plan of care, clear and concise documentation for the reasons for any treatment should be outlined and all treatment should never be continued unless clearly helpful both by clinical response and the best objective measures. ❖

¹*Chou, R. et. al. Ann Intern Med 2007;147:478-491*

² *Rating system developed by U.S. Preventive Services Task Force*

A: Strong recommendation to use this treatment with good evidence it can improve outcome and potential benefits outweigh potential harm.

B: Consider this treatment with at least fair evidence outcome is improved, and that potential benefits moderately outweigh potential harm, or that benefits are small but there are no significant harm, costs, or burdens associated with this treatment.

C: Neutral. Benefits slightly outweigh harm, or the balance between the two is too close to make a recommendation for or against.

D: Against. Evidence suggests this treatment is ineffective or potential harm outweighs potential benefit.

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Case Study

No Clear Ability to Limit Accrual of Attorney Fees Under ORS 742.061

— by Jeffrey D. Eberhard

Claims Pointer: An offer of judgment on an insurance claim made more than six months after the insurer receives proof of loss does not “cut off” the accrual of attorney fees available to an insured if the insurer fails to settle the claim. Contesting the “reasonableness” of attorney fee requests is likely the only argument available to limit fees.

An attorney fee award can transform a potentially small claim into a huge liability for a defendant. Unfortunately, defendants are often left with little means of contesting or limiting attorney fee awards. For example, in 2008 the Oregon Supreme Court analyzed a motor vehicle accident and held that because ORS 20.080 (the small claims statute) was more specific than ORCP 54E (limiting the recovery of attorney fees in certain situations), ORCP 54E did not limit the plaintiff’s entitlement to attorney fees under ORS 20.080. See in Powers v. Quigley, 345 Or 432, 198 P3d 919 (2008). Following a similar tone as Powers, the Oregon Court of Appeals recently addressed whether an offer of judgment made more than six months after a proof of loss was filed limits the accrual of attorney fees the insurance dispute statute (ORS 742.061). Wilson v. Tri-Met, in the Court of Appeals of the State of Oregon (Case no: A138860, April 14, 2010).

In 2002, Jefferson Wilson, as a passenger in a Tri-Met bus, was injured when the Tri-Met bus driver braked suddenly to avoid a collision. Wilson submitted a proof of loss for a UIM claim to Tri-Met and—more than six months later—Tri-Met offered to settle Wilson’s claim for \$10,000 “inclusive of costs,” which Wilson rejected. At trial, a jury awarded Wilson \$5,930.58 in damages. Wilson then petitioned the trial court for attorney fees under ORS 742.061 arguing that his recovery of

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\$5,930.58, when combined with his attorney fees and costs, exceeded defendant’s \$10,000 offer and thus he was entitled to attorney fees under ORS 742.061. (ORS 742.061 provides that when a settlement is not reached within six months of the proof of loss and the plaintiff’s recovery exceeds the amount of any tender made by the defendant, the court must grant the plaintiff reasonable attorney fees).

Tri-Met objected to the attorney fee request and argued that an offer of judgment under ORCP 54E effectively “cuts off” attorney fees after the date it was made. (ORCP 54E provides that, where an offer of judgment is made more than 10 days prior to trial and is rejected, and the subsequent recovery is less than the offer of judgment, the party that rejected the offer is not entitled to attorney fees). Tri-Met also argued that Wilson was not entitled to attorneys fees at all because his recovery had not exceeded the \$10,000 offer. The trial court concluded that Tri-Met’s \$10,000 offer did not limit Wilson’s entitlement to attorney fees under ORS 742.061 because it was offered more than six months after Wilson submitted his proof of loss. However, the trial court also held that ORCP 54E limited Wilson’s recovery of attorney fees under ORS 742.061 to those fees that had accrued prior to Tri-Met’s offer of judgment. Both parties appealed to the court of appeals.

On appeal, Tri-Met argued that ORS 742.061 has three requirements: (1) the parties do not settle within six months from the proof of loss; (2) the action must be based upon an insurance policy; and (3) any recovery by a plaintiff must exceed the amount of “any tender” made by a defendant.

The court disagreed and held that “any tender” must be a timely offered; and under ORS 742.061, an offer tendered is only timely if filed within six months from receiving proof of loss. Thus, Wilson was entitled attorney fees under ORS 742.061.

The court of appeals then addressed whether ORCP 54E limits the amount of attorney fees a plaintiff is entitled to under ORS 742.061. Wilson argued that since ORCP 54E and ORS 742.061 directly conflict (ORCP 54E only requires an offer be made 10 days before trial, whereas ORS 742.061 requires an offer

within six months of proof of loss that is greater than the eventual award), ORS 742.061, which is more specific, must be treated as an exception to ORCP 54E—trumping ORCP 54E. The court of appeals, looked to the Supreme Court’s holding in Powers v. Quigley, (analyzing attorney fees under ORS 742.061 and ORS 20.080), and agreed with Wilson that an offer of judgment made before trial, but more than six months after a proof of loss, will not limit the accrual of attorney fees under ORS 742.061.

Although the outcome in this case is troubling, it seems to reflect the evolution of the Oregon courts’ interpretation of ORS 742.061. Ever since the holding in Dockins v. State Farm over 20 years ago, Oregon appellate courts have stated it was the legislature’s intent that claims be resolved quickly. 329 Or 20 (1999). In Dockins the court said that ORS 742.061 “plainly seeks to protect insureds from the necessity of litigating their valid claims. It has no converse purpose of protecting insurers from litigation.” The only way to cut-off an attorney fee claim is to make an offer within six months of the proof of loss that is greater than plaintiff’s eventual award. Due to limited information, making an appropriate offer can be very difficult. If a large enough offer is not made and plaintiff’s award exceeds the offer, the only way to attack an attorney fee claim is to contest the reasonableness of the attorney fees sought by the plaintiff. ❖

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