STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Suite 502
Austin, Texas 78701

SOAH DOCKET NO. 453-03-1901.M2
[MDR TRACKING NO. M2-03-0407-01]

AMERICAN HOME ASSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
VS.	§	**OF**
	§	
RYAN N. POTTER, M.D.	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

This case involves a request for authorization to perform a lumbar discogram with CT scan. An Independent Review Organization (IRO) reviewed this case for the Texas Workers' Compensation Commission (TWCC or Commission) and found that the requested procedure was medically necessary. This decision reverses the decision of the IRO and finds that Petitioner, American Home Assurance Company (AHAC or Carrier), proved by a preponderance of the evidence that the requested procedure is not reasonable and medically necessary and, therefore, denies preauthorization.

I.
PROCEDURAL HISTORY

A hearing in this matter convened on February 27, 2003, at 3:30 p.m., at the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 West 15th Street, 4th Floor, Austin, Texas, before Administrative Law Judge (ALJ) Nancy N. Lynch. Petitioner American Home Assurance Company (AHAC) appeared through its counsel, Dan C. Kelley. The Respondent, Dr. Ryan N. Potter, M.D. was contacted by telephone. His office informed the ALJ the doctor was involved in a procedure with a patient. He eventually came to the telephone and said he did not know he had a scheduled hearing. The pleading file, however, contained a faxed notice to Dr. Potter's office that indicated receipt by his office. After the hearing began, Dr. Potter said he did not have the documents provided by Petitioner and requested a continuance. The continuance was granted and the parties were instructed to submit three new agreed dates for the hearing on the merits.

Rather than agree to new dates for the hearing on the merits, Dr. Potter sent a fax to SOAH on March 3, 2003, requesting withdrawal of his previous request for continuance and seeking removal of the case from the docket with no further action. AHAC responded by filing a motion to

retain the case on the docket since the last order issued in the case found that the procedure requested by Dr. Potter *should* be preauthorized. Dr. Potter did not have standing to withdraw the case from the docket unless he also withdrew his request for the medical procedure. That, he did not do. The ALJ ordered the case retained on the docket and rescheduled the hearing for May 30, 2003, at 2:00 p.m. at SOAH.

The hearing was re-convened at the designated time and place. AHAC was again represented by Dan Kelley. Dr. Potter's office was contacted by telephone. Ms. Patricia Sambarno, who said she was the person responsible for insurance matters in Dr. Potter's office, came to the telephone and said Dr. Potter would not participate in the hearing. He did, however, still consider the requested procedure medically necessary and wanted it authorized. The ALJ indicated the hearing would proceed with or without Dr. Potter's participation and a ruling on the medical necessity of the requested procedure would be issued after the hearing. Ms. Sambarno then disconnected and the hearing proceeded. Petitioner AHAC presented evidence and argument. The hearing was adjourned and the record closed the same day.

II.
THE APPLICABLE LAW

Section 408.021(a) of the Texas Workers's Compensation Act (Act) provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that:

(1) cures or relieves the effects naturally resulting from the compensable injury;
(2) promotes recovery; or
(3) enhances the ability of the employee to return to or retain employment.

Section 401.011(19) of the Act defines "health care" to include "all reasonable and necessary medical ... services." Certain health care treatments require preauthorization, a prospective showing of medical necessity. TEX. LAB. CODE ANN. § 413.014 (Vernon 1996), 28 TEX. ADMIN. CODE (TAC) § 134.600. Petitioner bears the burden of proving that preauthorization for the discogram with CT scan requested in this case should be denied. 28 TAC § 148.21(h).

III.

EVIDENCE AND ARGUMENTS

The evidence consists of (1) approximately eighty pages of documentary evidence concerning Claimant's injury and the history of its diagnosis and treatment thus far, and (2) testimony from Dr. John A. Gragnani, an expert witness offered by AHAC to testify about discograms in general, and about the lack of medical necessity for the requested lumbar discogram and CT scan in particular.

1. History of Claimant's injury and early treatment

Claimant was injured on_____, when he unloaded an 80 pound box of meat from a truck and turned in an awkward position, injuring his back. Claimant's first visit with the treating physician, Dr. Charles Votzmeyer, D.C., was November 8, 2001. He complained of lower back pain, pain in both legs, and difficulty sleeping. On the initial visit, Dr. Votzmeyer conducted a thorough examination, including range of motion tests, a radiography examination, and a digital examination. Orthopedic examination of the lumbar spine revealed muscle spasm, tenderness, and swelling in the lumbar spine area including both buttocks and both posterior thighs. Dr. Votzmeyer gave Claimant a lumbar orthopedic support, removed him from work for a week, and prescribed bed rest because of suspected neurological manifestations.

Claimant received almost daily proprioceptive neuromuscular facilitation (PNF)[1] and physical modalities from Dr. Votzmeyer for the first week after the injury. His treatment then decreased to approximately three times a week, and eventually to once a week for almost a year.[2] Later, stretching and exercises (both monitored and at home) were added to Claimant's program. Claimant was soon directed to start walking in and around his home--approximately a quarter of a mile.

In December 2001, Claimant had an MRI and Dr. Votzmeyer told Claimant the MRI report indicated "disc and nerve root involved injuries." He said he was going to seek a referral to a neurosurgeon although they might have difficulties getting a referral because of the compensability dispute.

In January, Claimant indicated the pain in his legs was intermittent rather than constant. He was told it would be up to him to continue his exercises and stretching program at home. Dr. Votzmeyer also informed Claimant that he had reached a point where the rehabilitation program at the office would not progress unless they got further tests, evaluations, and recommendations from other specialists due to the severity of the patient's injuries.

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[1] A type of flexibility exercise which combines muscle contraction and relaxation with passive and partner-assisted stretching.

[2] The compensability of Claimant's injury was not determined until April 2002.

Dr. Votzmeyer wanted to keep Claimant off work until after the evaluations were performed because he was concerned Claimant would aggravate his condition if he returned to work. Claimant continued to receive PNF at Dr. Votzmeyer's office. On January 25, 2002, Dr. Votzmeyer began recording Claimant's reported pain on a scale of 0 - 10 with 10 being the most severe. On that day, Claimant reported pain of a 5 which decreased to a 4 after the PNF treatment.

In February, Dr. Votzmeyer's notes continued to reflect his consistent notation that Claimant presented with muscle spasm, tenderness, and swelling. Claimant continued to receive PNF and regularly experienced a decrease in pain following the treatment. Once he came in with a 6 and left with a 4; another day he came in at a 6 and left at 5; the next day he was at a 4.

In March, Dr. Votzmeyer reported Claimant still had positive orthopedic signs and symptoms indicative or his original injury with approximately 50% recovery from those injuries having been accomplished. Dr. Votzmeyer instructed Claimant to start walking a mile a day.

While Claimant's therapy continued, Dr. Votzmeyer also sought approval for referrals to specialists and various tests. Although some tests were obtained, others were delayed while Claimant's employer contested the compensability of his injury. The injury was determined to be compensable in April 2002.

B. <u>The recommendation for a lumbar discogram with CT scan</u>

After the compensability issue was resolved, Dr. Votzmeyer referred Claimant to other specialists for evaluation and treatment recommendations.

1. Dr. Victor Kareh, M.D., and neurosurgeon

Dr. Victor Kareh, M.D., a neurosurgeon, examined Claimant on April 29, 2002. Claimant reported significant constant pain in his back and running down his right leg that gets worse with activity. He reported some improvement in the last couple of months but attributed the improvement to the fact he had been resting.

Dr. Kareh reviewed the lumbar MRI that was done in December 2001, and noted herniated disks at L4-5 and L5-S1 on the right side. His neurological examination was "basically normal." Dr. Kareh ordered a lumbar myelogram and CT scan for a more detailed look and those reports revealed a bulging disk at L4-L5. (P's Ex. 1, p. 53-54). He recommended that Claimant be evaluated by a pain specialist and have a lumbar discogram to "see if we can identify a source of pain in his back." (P's Ex. 1, p. 50).

2. Dr. Ryan Potter, M.D., and pain specialist

Dr. Potter examined Claimant for the first time in late July 2002. He reported that Claimant's pain "starts in his back and is pins and needles and radiates down to his buttocks and just below his buttocks as well as into his right anterior thigh in a stabbing sensation." (p. 64). He described Claimant's injury as revealed by the CT lumbar myelogram to be lumbar displaced discs at L3-4, L4-5, and L5-S1.

Dr. Potter decided to do two epidural steroid injections (ESIs) and, if those did not provide significant relief, to proceed with provocative discography. The ESIs were done on August 27, 2002, and September 9, 2002. Immediately after each procedure, Claimant reported significant relief. Each injection was followed by a series of chiropractic treatments designed "to disperse the epidural injection liquid throughout the entire disc." After the second ESI, Dr. Potter's treatment plan was originally to repeat the process.

However, on October 3, 2002, Dr. Potter decided to proceed with provocative discography at L2-3, L3-4, L4-5 and L5-S1. This testing protocol was designed to examine known displaced discs and a control disc (the one at L2-3). He apparently modified his treatment plan because the ESIs only resulted in a decrease in Claimant numeric pain scores from 8.5 to 6 on a scale of 0-10.[3]

C. Insurance company's denial

On October 21, 2002, the Carrier notified Dr. Potter that the discogram was not authorized because there was:

> no rational medical evidence to support any consideration of spinal fusion. No justification for subjective/controversial procedure w/inherent risk of disc injury.

(P's Ex. 1, p. 5). The letter stated it did not approve the procedure per professional guidelines: Cochran/AHCFR. It also informed Dr. Potter of his right to appeal, and Dr. Potter appealed.

D. Insurance company's second denial

The Carrier denied Dr. Potter's appeal by letter dated November 5, 2002. The appeal had been reviewed by a consulting practitioner in the same profession and a similar specialty that typically manages the medical condition, procedure, or treatment under consideration. The

[3]This is somewhat curious since Claimant had repeatedly described his pain to Dr. Votzmeyer as 6 and frequently decreasing to 5 or 4 during the time he was only receiving chiropractic treatments. In fact, Dr. Votzmeyer notes on October 18, 2002, after Dr. Potter made this entry, indicated he rated his pain as a 4.

consulting practitioner was Dr. John Gragnani, M.D., who is board certified in physical medicine and occupational environmental medicine. Dr. Gragnani also testified as an expert witness at the hearing.

In reviewing the appeal for the IRO, Dr. Gragnani talked to Dr. Potter by telephone to find out why he wanted to perform the lumbar discogram with CT scan. Dr. Gragnani reported that Dr. Potter was considering Intradiscal Electrothermal Annuloplasty or "IDET". This confirmed Dr. Gragnani's view that the lumbar discogram and CT scan were not medically necessary in this case because, in his opinion and according to recognized authorities, this rather new surgery was not appropriate treatment for this patient. In fact, Dr. Gragnani testified there was no appropriate follow up surgical treatment for this patient. The other most likely follow up procedure was fusion, and there was no need for fusion because there was no evidence of instability in Claimant's spine.

Dr. Potter, according to Dr. Gragnani, "couldn't disagree with him" that surgery for degenerative changes was not appropriate." (P's Ex. 1, p. 8). Dr. Gragnani based his opinion on:

1. Studies done by Dr. Carragee at Stanford University regarding the results of discography.
2. The Phase III Clinical Guidelines set forth by the North American Spine Society that suggest that fusion is indicated only with proven segmental instability, which, in this case, is lacking.
3. Substantial publications from the Cochrane Collaboration studies, reproduced in the journal, SPINE, regarding lack of efficacy of surgery for degenerative disc changes.

Therefore, he concluded, it is pointless to do a lumbar discogram/CT scan on this patient because there is no indication for follow up surgical intervention whether by IDET or by fusion.

E. <u>Dr. Potter's response letter of November 5, 2002</u>

Dr. Potter responded by letter dated November 5, 2002. He pointed out that the patient had experienced significant pain for about a year despite rehabilitative therapy and epidural steroid injections. He stated that the discs involved are solely "displaced discs, i.e., protrusions and bulges, and not so much herniations as the annulus appears intact." (P's Ex. 1, p. 76). Claimant has multiple annular bulges at multiple levels.

Dr. Potter suggested that the reviewer in the case did not have a good understanding of discograms. He maintained that Claimant needs a discogram to determine which of the discs is generating his pain. He then referred to an attachment to his letter of November 5, 2002, a written statement by Dennis Karasek, M.D., San Antonio, titled "Rebuttal to discography denial memo."

(P's Ex. 1, p. 77, Ex. 3 to Dr. Potter's letter). Dr. Karasek states that the *only* test currently available to determine which disc is causing the pain (in a case where there are multiple abnormal discs) is discography. He further quotes Dr. Karasek, "discography accurately detects true positives 90% of the time, except in people with severe psychiatric disorders." (P's Ex. 1, p. 76). Dr. Potter, in this letter, asserted that this patient does not have a severe psychiatric disorder and, therefore, discography should detect a disc problem and the correct level 90% of the time. He also included an attachment labeled Exhibit 4, titled "An Analysis of the Carragee Data on False-Positive Discography." (P's Ex. 1, p. 24-31). This article, according to Dr. Potter's letter, rebuts the Carragee Data and supports his contention that the patient is clearly in need of a discogram.

F. <u>The testimony of Dr. Gragnani</u>

Dr. Gragnani, an expert, was the only witness who testified in this hearing. He explained that discography has been controversial for over 30 years. Some studies show it to be unreliable to determine the nature or extent or location of back pain. Other case studies have attempted to repudiate that conclusion. The debate continues.

One of the major problems was illustrated by Dr. Carragee's studies. They demonstrated that the subjective component of discography which relies on the patient saying "yes, that reproduces my pain" did not really localize the pain. Discograms were also shown to be unreliable because people who had no abnormalities also complained of pain when the procedure was performed. Dr. Gragnani further testified that the American College of Radiology, cited by some proponents of discography as recognizing discography as a useful tool, actually recognizes it as a "procedure" -- but not one with much reliability.

Even if a discogram and CT scan locates the painful disc, there is no clear consensus about appropriate treatment at that point. Considerable medical review literature agrees that operating on discs with degenerative changes is not recommended. Dr. Gragnani cited the Journal of Spine, the Guidelines of the North American Spine Society's Phase III Clinical Guidelines, the Agency for Health Care Policy Review (AHCPR) No. 14 done in the mid-1990s, and a large data bank called the "Cochrane Collaboration Studies" in support of this proposition. Furthermore, he opined, there is definitely no reason to do a discography when even if the painful disc is identified, there is no recommended surgical procedure identified in research studies that would clearly alleviate the pain.

Discograms carry risks, according to Dr. Grangnani. A number of patients with normal discs have complained of pain from the injections themselves after the discography. Dr. Gragnani also testified he had seen pre-discography CT scans and post-discography CT scans and had identified discs that looked degenerated after the discogram whereas before the discogram they displayed no damage.

Finally, Dr. Gragnani noted any type of injection carries with it a risk of introducing

infection. In summary, his opinion was that it is pointless to subject a patient to this kind of abuse without a good reason to do so.

G. <u>Dr. Potter's case</u>

As noted above, Dr. Potter did not appear at the hearing or present any further evidence beyond that which is in the evidentiary documents offered by Petitioner.

IV.
ALJ'S ANALYSIS AND DECISION

Petitioner has proved, by a preponderance of the evidence, that the requested procedure is not medically necessary and should not be preauthorized. The ALJ found Dr. Gragnani's testimony to be persuasive, especially because there was only a small likelihood that the procedure would accurately detect the disc causing Claimant's pain, the procedure could actually damage Claimant's discs further, and there was no clearly viable follow up treatment even if the procedure did isolate the disc or discs causing Claimant's pain. Dr. Gragnani's testimony at the hearing was unchallenged. Neither Dr. Potter nor any other doctors testified about why this procedure should be authorized as reasonable and medically necessary for this particular Claimant. The parts of the documentary record that set out Dr. Potter's views were not sufficiently convincing to outweigh Petitioner's evidence.

The ALJ, therefore, concludes that the IRO was incorrect in finding that this procedure should be preauthorized. Under the record provided in this case, the ALJ finds that the lumbar discogram\CT scan is not medically necessary and should not be preauthorized.

V.
FINDINGS OF FACT

1. On_____, Claimant suffered an compensable injury to his lower back and legs when he unloaded an 80 pound box of meat from a truck and turned in an awkward position.

2. Claimant consulted Dr. Charles Votzmeyer, D.C., on November 8, 2001, who became his treating physician.

3. Dr. Votzmeyer's initial examination found muscle spasm, tenderness and swelling in the lumbar spine area including both buttocks and both posterior thighs. The records include this description of Claimant's symptoms throughout the entire year of his chiropractic treatment.

4. Dr. Votzmeyer treated Claimant with proprioceptive neuromuscular facilitation (PNF) and physical modalities--at first on a daily basis. Then, the treatment gradually decreased in frequency but continued until at least November 2002.

5. Claimant also performed a supervised exercise and stretching program and received other conservative forms of treatment under Dr. Votzmeyer's supervision. After a few months, he also engaged in a home exercise and walking program.

6. Claimant's employer contested the compensability of his injury, and this dispute was resolved in Claimant's favor in April 2002.

7. Petitioner, American Home Assurance Company (AHAC), was the workers' compensation insurance Carrier for Claimant's employer.

8. Dr. Victor Kareh, a neurosurgeon, performed a neurological examination in April 29, 2002, reported results as "basically normal," and recommended a lumbar myelogram and CT scan.

9. The myelogram and CT scan were performed in June 4, 2002, and revealed a broad based disc bulge at L3-4 that slightly flattened the thecal sac; a prominent central disc protrusion in the midline at L4-5 compressing the thecal sac, but not appearing to extend into the foramen. Mild arthropathy at the facets at L4-5; and a very prominent broad-based disc bulge more prominent in the central area that may extend just into the foramen bilaterally.

10. On August 27, 2002 and September 9, 2002, Dr. Kareh administered epidural steroid injections (ESIs) to Claimant. Immediately after the injections, Claimant reported significant relief. However, his relief did not last very long.

11. In October of 2002, Dr. Ryan Potter, M.D., requested preauthorization from Carrier for a lumbar discogram and CT scan in an attempt to determine which disc was causing Claimant's pain.

12. Carrier denied the Dr. Potter's request for preauthorization.

13. Dr. Potter appealed Carrier's denial of preauthorization and it was again denied.

14. On or about December 5, 2002, the Medical Review Division (MRD) of the Texas Worker's Compensation Commission (Commission) received a request for a dispute resolution review from Dr. Ryan N. Potter, M.D. The case was sent to an Independent Review Organization (IRO) for determination.

15. The IRO found the procedure should be preauthorized and, based on those findings, the MRD ordered Carrier to pay the reasonable and necessary costs of the requested procedure.

16. Carrier timely requested a hearing at the State Office of Administrative Hearings on this matter, seeking review and reversal of the IRO decision.

17. The Commission mailed notice of the hearing's setting to the parties on January 28, 2003. The hearing was convened and then continued pursuant to Dr. Potter's request.

18. The hearing on the merits was held May 30, 2003, before Administrative Law Judge Nancy N. Lynch. Carrier was represented by counsel, Dan Kelley. Dr. Ryan N. Potter did not participate after being contacted by telephone. Neither did he withdraw his request for authorization to perform the discogram with CT scan.

19. The requested procedure, a lumbar discogram with CT scan, is a highly subjective test depending on the patient to give accurate information about when the pain produced by the test is the same as the pain the patient has been experiencing.

20. A discogram entails risks of further damage to the disks by the test itself.

21. There is there is no clear consensus treatment protocol to alleviate Claimant's pain even if the test did successfully isolate the disc or discs causing his pain.

VI.
CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and SOAH's procedural rules at 1 TAC Ch. 155.

3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Carrier, the party seeking relief, had the burden of proof in this case, pursuant to 28 TAC § 148.21(h).

5. Based upon the foregoing Findings of Fact, the requested lumbar discogram with CT scan is not an element of health care medically necessary under § 408.021of the Act.

6. Based upon the foregoing Findings of Fact and Conclusions of Law, preauthorization for the requested discogram with CT scan should not be approved, pursuant to § 413.014 of the Act and 28 TAC § 134.600.

ORDER

IT IS THEREFORE ORDERED that preauthorization for a lumbar discogram with CT scan, requested by Dr. Ryan Potter for the diagnosis and treatment of Claimant be, and the same is hereby denied.

SIGNED September 24, 2003.

NANCY N. LYNCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS