

AMERICAN HOME ASSURANCE	§	BEFORE THE STATE OFFICE
COMPANY,	§	
Petitioner	§	
	§	
vs.	§	OF
	§	
J. R.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case is an appeal by American Home Assurance Company (Petitioner) from a decision by an Independent Review Organization (IRO) in a preauthorization dispute initiated before the Texas Workers' Compensation Commission (Commission). The IRO ordered approval of preauthorization for neuroplasty decompression medial/radial nerve and internal neurolysis nerve graft. Petitioner challenged the IRO's decision, alleging that something other than the work-related injury likely caused the nerve damage to Respondent's upper left extremity.

In this decision, the Administrative Law Judge (ALJ) finds that the requested neuroplasty decompression medial/radial nerve and internal neurolysis nerve graft is medically necessary and orders preauthorization of the procedure.

I. Jurisdiction and Venue

The Commission has jurisdiction over this matter pursuant to § 413.031 of the Texas Workers' Compensation Act (Act), TEX. LABOR CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003. No party challenged jurisdiction or venue.

II. Statement of the Case

The hearing in this docket was convened on August 21, 2003, at SOAH facilities in Austin, Texas. ALJ Bill Zukauckas presided. Petitioner was represented by Dan Kelley, Attorney. Respondent's representative, Ben Higbee, D.C., appeared by phone. After presentation of evidence and argument, the hearing was adjourned and the record closed.

The record developed at the hearing revealed that, on ____, Respondent sustained a work-related injury to his upper left extremity when he fell approximately six feet off a ladder in a freezer at ____. Although it was unclear who he first saw for the treatment of his injury, it appears that he did have an MRI scan of his left shoulder on July 18, 2002. This appears to be the first day that he sought treatment for the work-related injury, likely through one of the several chiropractors treating Respondent and helping him pursue this claim. Respondent has seen multiple chiropractors, including Dr. Field, Dr. Spencer Sloane, Dr. Edward Breeding, and Dr. Ben Higbee. All have helped

him pursue benefits in this matter and the specifics of their treatments are not mentioned here since the benefit at issue is nerve graft surgery. That topic has been discussed extensively by many medical doctors with various specialties and diverse opinions. A very general overview of those opinions and findings is discussed below.

On August 8, 2002, Respondent saw Jonathan Walker, M.D., and had nerve conduction studies of his left upper extremity and neck. Dr. Walker concluded that the EMG results showed an abnormality due to the absence of a radial sensory response on the left side. Dr. Walker went on to further note that these results could “represent a complete conduction block.” Dr. Walker’s impressions about the EMG studies also noted likely C6, C7, and C8 radiculopathy or a plexus injury involving the radial, medial, ulnar, and muscular cutaneous nerves.

On August 30, 2002, Respondent had a left brachial plexus MRI scan performed at North Texas Imaging. The radiologist who read that test, John D. Fisk, M.D., said that it was negative in terms of showing inflammatory changes from a plexus tear. In apparent response to a question about this negative result from one of the referring chiropractors, Dr. Fisk noted that one possible explanation for this negative result might be the length of time between the imaging and the injury. On September 16, 2002, Dr. Walker ordered follow-up electrodiagnostic testing. His impression of those tests was that this again was “an abnormal study due to the findings of prolonged sensory latency with stimulation of the left median nerve at the wrist indicating probable trauma or entrapment of this nerve at the wrist.”

On September 30, 2002, Respondent was assessed by John S. Townsend, M.D., at Metroplex Orthopedics. Dr. Townsend concluded that Respondent had a left upper extremity double-crush injury with C6 palsy and brachial plexus neuropathy. He also noted a left shoulder rotator cuff tear. On November 25, 2002, Respondent was reevaluated by Dr. Townsend. Dr. Townsend’s notes indicate that Respondent had essentially no voluntary movement of the upper extremity and that there was visible atrophy of both the brachial and antebrachial portions of the arm.

On January 3, 2003, Respondent was examined by R. Frank Morrison, M.D., specializing in physical medicine and electromyography. Dr. Morrison confirmed nerve damage to the left extremity and believed surgical decompression should be considered. He further added that the pervasive denervation on EMG in the radial muscle groups on this patient’s left side limits the time-frame of his injury. He noted that the hypothesis (presented by Petitioner’s physician, Dr. Tonn) that Respondent had a long-standing nerve palsy was “preposterous.” On January 7, 2003, Dr. John B. Payne, D.O., saw Respondent for a reevaluation. He concluded at that time, in the absence of reinnervation on a recent repeat EMG/NCV, that Respondent would need to undergo radial nerve exploration, with either internal neurolysis, or nerve grafting, depending on what was found. These conclusions by Dr. Payne form the basis of the nerve graft preauthorization request.

On January 30, 2003, Respondent’s records were reviewed by Dr. Martin R. Steiner, M.D., on behalf of the Carrier. Dr. Steiner is a board-certified neurologist who has been in private practice for 29 years. From his review of the records, he believes Respondent’s injury was either a blunt contusion to the left shoulder or a contusion to the left outstretched hand, but nothing more severe. In either case, neither type of injury would be expected to lead to the profound EMG abnormalities noted by Dr. Morrison on January 3, 2003. He believes those abnormalities are best explained by

some disease of life such as a brachial plexitis of either immune origin or viral etiology. He believes that, had Respondent sustained the type of significant traumatic injury to produce the nerve findings in his left extremity, he would have sought immediate medical attention because of the pain. Because Respondent did not seek immediate treatment, Dr. Steiner concludes that Respondent's nerve damage was not caused by the fall at work.

Additionally, he reports that the lack of any kind of dislocation of the left shoulder speaks against the fact that Respondent sustained a brachial plexus to the degree found by Dr. Morrison. He concluded that Respondent's at-work injury of ____, produced only contusions and that Respondent is deceitful about the origins of the nerve damage to his left extremity.

On January 30, 2003, Petitioner denied the request for neuroplasty decompression of the medial/radial nerve, internal neurolysis, and nerve graft for Respondent's left extremity on the basis of Dr. Steiner's opinion. Respondent timely appealed this denial. On June 25, 2003, the IRO issued an opinion finding that the nerve graft surgery was medically necessary to treat Respondent's compensable injury.

III. The Parties' Evidence and Arguments

1. Petitioner's Evidence and Arguments

Petitioner presented the testimony of Dr. Melissa Tonn, M.D. Dr. Tonn did an extensive review of the medical records and performed a comprehensive examination of the Respondent. Like Dr. Steiner, her conclusions were that Respondent appeared to be evasive when giving her his medical historical, evasive about the particulars of his work-related injury, and uncooperative in performing physical exam tasks. She also noted that Respondent wore sunglasses during the entire exam, finding that to be odd and possibly evasive behavior.

Dr. Tonn expressed doubt that Respondent could have sustained such a severe brachial plexis injury to his left arm just by falling off a ladder from six feet up. In her experience, most injuries of this type come from very traumatic accidents, like motorcycle wrecks, where the upper extremity is extraordinarily stretched. Dr. Tonn testified that she found it unusual and suspicious that Respondent did not immediately seek medical attention if he had experienced such a severe injury at work. She believes it would have produced excruciating pain requiring immediate medical attention. She wonders how it could have been possible for Respondent to function in the two scheduled days he was off, after such an injury. She questions how he could have possibly returned to work on July 12, 2002, and apparently worked a complete day (before getting terminated for alleged misappropriation), if he had experienced such a traumatic injury.

Dr. Tonn notes that Respondent filed his worker's compensation claim only after he was terminated from Walmart for allegedly purchasing meat there that had been intentionally underpriced by fellow employees. She postulates that Respondent could have had some long-standing nerve palsy involving the upper extremity and that it may have begun to suspiciously manifest itself only after Respondent became disgruntled following his dismissal from work termination over accusations of misappropriation.

In summary, Petitioner argues that, although Respondent has some clear nerve damage and palsy to his upper left extremity, it believes that Respondent suffered only contusions from his fall at work. Petitioner further argues that the nerve damage is a disease of life for Respondent that predated his work fall and that he has fabricated the relationship between the work injury and the nerve damage.

B. Respondent's Evidence and Arguments

Respondent, represented by his treating chiropractor, Ben Higbee, called as his primary witness John B. Payne, D.O., a neurologist specializing in micro neurosurgery, to discuss Respondent's condition and the surgery he proposes to perform. Dr. Payne testified that Respondent has complete and profound radial nerve palsy. He stated that the nerve injury is clearly located somewhere from the cords below the clavicle to the elbow. He disagrees with any assessment that concludes there was no injury to the radial nerve.

Dr. Payne stated that the clinical evidence was overwhelming that Respondent needs the appropriate surgery to explore the cords to the median nerve from his trauma. He admits that there is only a 50-60% chance of success because it is over a year since Respondent's injury, but he believes surgery is the only viable option for Respondent at this date and well worth the risk considering the alternative of complete loss of use for that extremity. He agreed that the longer the matter is delayed, the less likely it will be that Respondent has a successful outcome to the nerve graft surgery.

Respondent argues that the issue of the compensability of the injury has already been decided by agreement through the Decision and Order of the Commission's benefit review conference, issued February 6, 2003. Respondent argues it is unfair and outside of SOAH's jurisdiction to consider that issue again.

IV. Analysis

The ALJ concludes that Petitioner has failed to meet its burden of establishing that the requested surgery is not medically necessary treatment for Respondent's compensable injury. Therefore, the ALJ finds it appropriate to order authorization for the requested treatment.

This is a complex medical case with well-qualified medical doctors on both sides of the issue regarding Respondent's left extremity nerve damage. This case is somewhat unusual in that no medical records for Respondent from before the work-related injury were offered by either party. Doctors on both sides of the etiology issue make some persuasive points. For instance, it seems odd that Respondent's MRI, a month after his injury, would be negative. On the other hand, Dr. Fink's explanation that it may be too far in time away from the injury to be a productive MRI also seems plausible. Also persuasive was Dr. Tonn's testimony that if Respondent had suffered the traumatic injury necessary to cause the kind of nerve damage he exhibited, he likely would have been in unbearable pain and would have sought immediate medical attention. On the other hand, maybe Respondent had some preexisting nerve damage from birth that was fully severed by the work fall. On whole, the ALJ concludes the evidence indicates it is about as probable as not that Respondent's work-related injury either caused or precipitated the nerve damage to his left extremity.

Where the chance that a particular fact happened or not is evidentiarily equal, it cannot be said that a preponderance of the evidence supports a finding on that particular fact. In such circumstances, the party with the burden of proof on the issue has failed to meet its burden. Such is the situation in this case. Because Petitioner failed to show by a preponderance of the evidence that Respondent's compensable injury did not cause Respondent's nerve damage, Petitioner is not entitled to relief from the IRO decision in this case.

Accordingly, Respondent is entitled to an order consistent with the determination of the IRO, i.e., that the requested surgery is medically necessary and preauthorized.

In conclusion, the ALJ finds that, under the record provided in this case, the requested nerve graft surgery should be preauthorized, as was initially determined by the IRO in its decision of June 25, 2003. In support of this, the ALJ makes the following findings of fact and conclusions of law.

V. Findings of Fact

1. On, Respondent suffered a compensable, work-related injury to his upper left extremity that subsequently caused him nerve conduction loss and atrophy to that extremity.
2. Respondent waited until at least July 18, 2002, to seek medical attention for his work-related injury.
3. On January 7, 2003, Dr. John B. Payne, D.O., requested preauthorization from the insurance carrier, American Home Assurance Company (Petitioner), to perform nerve graft surgery to Respondent's upper left extremity.
4. In a letter dated January 30, 2003, Petitioner denied the preauthorization request on the basis that the proposed procedure was medically unreasonable or unnecessary based on the reports of its reviewing doctors.
5. Thereafter, Respondent made a timely request to the Texas Workers' Compensation Commission (Commission) for medical dispute resolution with respect to the requested procedure. The Commission referred the dispute to Independent Review Incorporated, an Independent Review Organization (IRO).
6. The IRO issued a decision on June 25, 2003, approving Respondent's request for preauthorization of the nerve graft surgery in IRO Case No. M2-03-0828-01.
7. Petitioner requested, in a timely manner, a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the IRO decision regarding preauthorization.
8. The Commission mailed notice of the hearing to the parties on July 23, 2003.

9. A hearing in this matter was convened on August 21, 2003, in Austin, Texas, before Bill Zukauckas, an Administrative Law Judge with SOAH. The staff of the Commission waived participation in the hearing. All other parties appeared and were represented.
10. Petitioner failed to show that Respondent's nerve damage to his left extremity was not work-related.
11. Petitioner has failed to show that Respondent's requested nerve graft surgery is not medically necessary to address the nerve damage he sustained from a fall at work.
12. For the injury in question to Respondent, the requested nerve graft surgery is medically necessary despite the fact that the probability of a successful repair of the nerve this long after the injury is no greater than 50-60%.
13. Without successful repair to the nerve in issue, Respondent will likely lose the use of his upper left extremity.

VI. Conclusions of Law

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act ("the Act"), TEX. LABOR CODE ANN. § 413.031.
2. The State Office of Administrative Hearings 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.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE ("TAC") § 133.305(g) and §§ 148.001-148.028.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC ' 148.21(h).
6. Based upon the foregoing Findings of Fact, Petitioner has failed to show that the nerve graft surgery that Dr. Payne is to perform on Respondent does not represent an element of health care that is medically necessary under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, preauthorization for the requested nerve graft surgery should be granted.

ORDER

IT IS THEREFORE, ORDERED that preauthorization for nerve graft surgery for Respondent's upper left extremity is granted.

SIGNED this 19TH day of September, 2003.

**BILL ZUKAUCKAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**