

AMERICAN HOME ASSURANCE	§	BEFORE THE STATE OFFICE
COMPANY,	§	
<i>Petitioner</i>	§	
	§	
VS.	§	OF
	§	
LOUIS PATINO, D.C.,	§	
<i>Respondent</i>	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

American Home Assurance Company (American Home) appealed a Texas Workers Compensation Commission (Commission) Medical Review Division (MRD) decision preauthorizing discography for an injured worker (claimant)’s spine. American Home appeared at the hearing and produced credible evidence that the discography is not medically necessary. Although his office was contacted at the beginning of the hearing, the provider requesting the service, Louis Patino, D.C., chose not to appear either personally or through representation. Based on the undisputed credible evidence that the discography is not reasonably required by the claimant’s injury, the Administrative Law Judge (ALJ) concludes that it should not be preauthorized.

I. PROCEDURAL HISTORY

On October 7, 2003, a hearing in this matter convened and closed before the undersigned ALJ at the State Office of Administrative Hearings, Austin, Texas. Attorney Dan Kelley represented American Home. Because there are no issues concerning notice and jurisdiction, those matters are addressed in the fact findings and legal conclusions without further discussion here.

II. DISCUSSION

1. Background

The claimant was injured in ____, when she was hit by a shopping cart while working at _____. The initial diagnosis was a hip contusion and low-back pain. Over a year-long period, she was evaluated by at least eight physicians and received a variety of services, including injections, chiropractic services, and physical therapy. At different times, different doctors recommended decompression, laminectomy, and discography procedures. According to American Home’s witness, Melissa Dawn Tonn, M.D.,¹ Dr. Patino requested a discography at the L4-L5 and L5-S1 levels of the claimant’s spine to determine whether she needs spinal fusion.

¹ Dr. Tonn is board certified in occupational medicine and pain management. She is a past chair of the Commission medical advisory committee. She was a lead physician in the most recent spine treatment guideline revisions. She performed a review of the preauthorization request on behalf of American Home in March 2003.

Employees have a right to necessary health treatment under TEX. LABOR CODE ANN. §§408.021 and 401.011. Section 408.021(a) provides “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 Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

As Appellant, American Home had the burden of proof.²

2. Dr. Tonn’s Testimony

Virtually all the evidence in the case was testimony by American Home’s witness Dr. Tonn.³ She explained that a discogram is not treatment but a diagnostic study, where the patient is asked to identify whether an injection of fluid into a disc recreates pain. In Dr. Tonn’s opinion, the discography was not medically necessary on two grounds, the questionable efficacy of discograms in general and her belief that spinal fusions are usually not effective.

Dr. Tonn’s opinion on discograms is based on the following considerations:

- Her belief that a discogram is not a useful diagnostic tool is backed up by a study concluding that discograms are one of the most controversial diagnostic tools and that their clinical utility has not been demonstrated.
- Pain prone individuals will have higher false positive discography results. Even patients with no back pain have had positive discograms.
- In performing a spinal fusion, it is mandatory to determine the exact source of the pain; however, the exact source is often more a matter of conjecture than anything else. Discograms are based on very subjective information that is sometimes not reliable.
- Spine treatment guidelines recommend that a discogram not be the sole basis for a spinal fusion. It is being used as the sole indicator in this case.

Dr. Tonn’s opinion on spinal fusion is based on the following considerations:

- A magnetic resonance imaging performed on the claimant on May 29, 2002, showed broad-based mild to moderate disc protrusions and facet arthritis at the L4-L5 and L5-S1 spinal levels. There was no clinically evident herniated disc and no slippage. Essentially, the study was normal for a woman over 50 years old.

² 28 TEX. ADMIN. CODE§ 148(h).

³ In other evidence, American Home requested that certain matters be deemed admitted because Dr. Patino did not respond to requests for admissions. Ex. 1. In view of the decision in this order, addressing that issue is unnecessary.

- Literature indicates that people most likely to benefit from spinal fusion are the ones with spinal instability. The claimant's spine is not unstable.
- One study indicated that all patients undergoing a two-level anterior interbody fusion had poor results.
- Another professional review said there was no indication that a surgical decompression or fusion for degenerative lumbar spondylosis has any advantage compared with natural history, placebos, or conservative treatment.
- Another study showed a 20-percent failure rate for spinal fusions in workers' compensation patients. After two years, only a relatively small percentage of patients had done well. After five years, over 80 percent became increasingly symptomatic.
- In Dr. Machenson's opinion, lumbar fusion has not been proven effective for patients with chronic low back pain.
- To perform spinal fusion, it is necessary to show the source of the problem. In the claimant's case, no correctable lesion has been shown.

Dr. Tonn's overall opinion is that spinal discography is not indicated because the efficacy of both discography and spinal fusions is questionable and because the claimant's symptoms have not been consistent and no correctable lesion has been identified.

3. Analysis

Dr. Tonn's testimony concluding the discography is not needed is virtually the only evidence in the record on the issue of medical necessity. Her testimony was credible. Her credentials are impressive as were the variety of studies and other literature she cited in support of her point of view. Because her testimony was the only credible evidence, the ALJ concludes the preponderant evidence is that the discography should not be preauthorized.

IV. FINDINGS OF FACT

1. The claimant was injured in ___ when she was hit by a shopping cart while working at ___.
2. The claimant was initially diagnosed with a hip contusion and low-back pain.
3. Over a year-long period, the claimant was evaluated by at least eight physicians and received a variety of services, including injections, chiropractic services, and physical therapy.
4. At different times, different doctors recommended decompression, laminectomy, and discography procedures.
- 5.

6. The claimant's treating doctor, Louis Patino, D.C., requested discography at the L4-L5 and L5-S1 levels of the claimant's spine to determine whether she needs spinal fusion.
7. _____'s workers' compensation insurance carrier, American Home Assurance Company (American Home), denied the claim.
8. The Texas Workers' Compensation Commission Medical Review Division ordered American Home to pay the claim.
9. A magnetic resonance imaging of the claimant's lumbar spine performed on May 29, 2002, showed broad based mild to moderate disc protrusions and facet arthritis at the L4-L5 and L5-L6 levels. There was no clinically evident herniated disc and no slippage. The results were essentially normal for a woman of the claimant's age.
10. No correctable lesion has been found in the claimant's back.
11. The claimant's symptoms have not been consistent.
12. A discogram is one of the most controversial diagnostic tools.
13. Pain prone individuals will have higher false positive results from discograms.
14. Even patients with no back pain will sometimes have positive discograms.
15. In performing spinal fusion, it is necessary to determine the exact source of the pain.
16. Discograms are based on very subjective information that is sometimes not reliable.
17. A discogram should not be the sole basis for deciding to do a spinal fusion.
18. Persons most likely to benefit from spinal fusion are ones with spinal instability.
19. The claimant's spine is not unstable.
20. As a general rule, Patients undergoing a two-level spinal fusion have poor results.
21. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
22. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.
2. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §2001.052.
3. American Home has the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.21(h).
4. American Home proved that the requested discography for the claimant was not medically necessary. TEX. LAB. CODE ANN. §§ 401.011 and 408.021.
5. The request for discography on the claimant's lumbar spine should be denied.

ORDER

IT IS, THEREFORE, ORDERED that the request by Louis Patino, D.C., that discography of the claimant's lumbar spine be preauthorized and covered by American Home Assurance Company be, and the same is hereby, **denied**.

Signed October 13, 2003.

JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS