

**JACOB ROSENSTEIN, M.D.,**  
**Petitioner**

**V.**

**ONEBEACON INSURANCE COMPANY,**  
**Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

### DECISION AND ORDER

Jacob Rosenstein, M.D., (Provider) challenges the decision by an Independent Review Organization (IRO) denying his request to preauthorize a lumbar discogram for an injured worker (Claimant). Onebeacon Insurance Company (Carrier) denied the request as medically unnecessary and the IRO upheld that decision. The Administrative Law Judge (ALJ) agrees with the IRO and concludes preauthorization for a lumbar discogram should be denied.

#### I. JURISDICTION, NOTICE, & HEARING

There were no challenges to notice or jurisdiction, and those matters are set forth in the findings of fact and conclusions of law without further discussion here.

ALJ Penny A. Wilkov convened a hearing in this case on April 6, 2005, at the State Office of Administrative Hearings (SOAH), William P. Clements State Office Building, 300 West 15th Street, Austin, Texas. Attorney Brandi Prejean appeared on behalf of Carrier. Provider, Jacob Rosenstein, M.D., appeared by telephone.

#### II. DISCUSSION

##### 1. Introduction

On \_\_\_\_, Claimant sustained a compensable injury when she sprained her lower back while crawling under a conveyor belt. Thereafter, in 1994, she underwent a lateral fusion at L5-S1 and in 1997, she had a second surgery, an anterior lumbar interbody fusion. From May 25, 1995 until

September 6, 2002, Claimant had few medical records. However, on February 6, 2002, Claimant presented to Provider for evaluation for low back pain. The CT scan showed solid fusion at L5-S1 with bilateral foraminal stenosis at L5-S1.<sup>1</sup>

Based on his evaluation, Jacob Rosenstein, M.D., Claimant's treating physician, requested preauthorization for a lumbar discogram.

The IRO reviewer, a board-certified spinal surgeon, agreed with the Carrier and found that the requested discogram was not medically necessary, stating:

(i)n this case, there is some level of degeneration present at all of the remaining level in this patient's lumbar spine. Lumbar discography would offer no significant benefit in deciding treatment; therefore, it is not medically necessary.

## 2. Applicable Law

Under the workers' compensation system, an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. § 408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN. § 401.011(19).

Certain healthcare, however, must be preauthorized before it can be provided and such preauthorization will be granted only if there is a prospective showing of medical necessity. TEX. LAB. CODE ANN. § 413.014. A discogram is included in the type of treatment that requires preauthorization. 28 TEX. ADMIN. CODE § 134.600(h)(7).

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<sup>1</sup>Carrier's Exhibit 1, pages 4-5.

## **C. Medical Necessity of the Lumbar Discogram**

### **1. Provider**

Provider, a board certified neurosurgeon, testified but did not introduce Claimant's medical records or other documents.

Provider contended that a discogram is medically necessary for several reasons. First, Provider pointed out that Claimant was injured in\_\_\_\_, had fusion surgery in 1997, and continued to improve after the surgery. However, in the last two years, Claimant has developed escalating pain in her low back and right leg. Since a myelogram conducted in June 2004 showed disc disease at L2-3 and a protruding disc, Provider argues that the next step is a discogram to locate the specific discs contributing to pain. Provider explained that fusion surgery can typically result in more stress on the other discs which can deteriorate over time and cause pain. He testified that this is a natural consequence of the surgery for the injury, and therefore, related to the compensable injury.

Second, Claimant has had numerous diagnostics which have ruled out other sources of pain, including an EMG in 2002 to detect muscle or nerve damage, with normal results, and a myelogram to find nerve compression, which was also negative. According to Provider, a discogram is necessary to determine whether discs above the fusion at L4-5, L3-4, and L2-3 are the source of her symptoms, thereby offering Claimant more options to resolve the pain.

Finally, Provider noted that Claimant has exhausted other conservative treatment methods, such as injections, physical therapy, and medications. A discogram would offer Claimant other potential treatment alternatives.

## **2. Carrier**

Carrier did not call any witnesses but instead, introduced a seven page document which comprised the entire medical record introduced in this case. The record consisted of the November 2004 report from the IRO, the August 2003 peer review report by Gary C. Hutchison, M.D., and the lumbar myelogram and CT, dated June 30, 2004.

Carrier argued that the discogram is not medically necessary. First, Carrier notes that the compensable injury was aggravation of lumbar spondylolisthesis at the L5-S1 level, which was treated with a fusion in 1994, and in 1997, with successful results. Now, however, it is twelve years after the date of initial injury and Claimant has developed pain in her low back and legs. Carrier argues that since the pain is not related to the injury at the L5-S1 level, Carrier should not be responsible for unrelated treatment.

Second, Carrier contends that a myelogram showed that Claimant had a protruding disc at L2-L3, but showed no need for surgery. The IRO concurred with this assessment by pointing out that there was degeneration at every level on Claimant's spine. The IRO reviewer reasoned that since surgical fusion is not advised at more than two disc levels, which has already occurred in this case, lumbar discography would not offer any benefit in deciding future treatment.<sup>2</sup> Therefore, Carrier argues a discogram would not lead to relief of Claimant's symptoms as the Claimant has degenerative problems which cannot be resolved by surgery.

Third, Carrier points out that many diagnostic tests have been already conducted, including an EMG and a myelogram, with normal results. Carrier argues that since significant testing has already occurred and since surgery is not an option, any finding from the discogram would not result in any treatment options.

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<sup>2</sup>Carrier's Exhibit 1, page 2.

Further, Carrier relies on the peer review provided by Gary C. Hutchison, M.D., a board certified Neurosurgeon. Dr. Hutchison's opinion is that the discogram is not medically necessary, as the source of pain may be better explored through a nerve root injection rather than the requested discogram, stating "that (selective nerve root injection) might not only be a diagnostic test but it could be treatment for her."<sup>3</sup>

#### **D. Analysis**

Provider has failed to present by a preponderance of the evidence that a discogram will promote Claimant's recovery, cure or relieve the natural effects of the injury, or enhance her ability to retain employment. The only medical records presented, the Independent Review Determination by the IRO reviewer and a peer review, substantiated that the procedure was not considered medically necessary by two concurring physicians. Provider did not counterbalance these opinions with any significant benefit or treatment options that would be offered by this procedure that would substantiate his claim that the requested procedure was necessary. Instead, what was established is that Claimant has pain, has had a number of diagnostic procedures to determine the source of the pain, and that surgery for disc degeneration would not be an option. Therefore, without some evidence that a discogram would result in some benefit to Claimant, the ALJ concurs with the IRO reviewer that the discogram is not medically necessary and should not be preauthorized.

### **III. FINDINGS OF FACT**

1. An injured worker (Claimant) sustained a compensable injury on \_\_\_\_, when she sprained her lower back while crawling under a conveyor belt.
2. Claimant underwent a lateral fusion at L5-S1 and in 1997, she had an anterior lumbar interbody fusion.
3. From May 25, 1995 until September 6, 2002, Claimant had few medical records.

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<sup>3</sup>Carrier's Exhibit 1, page 4.

4. On February 6, 2002, Claimant presented to Jacob Rosenstein, M.D., (Provider) for evaluation of low back pain.
5. The CT scan showed solid fusion at L5-S1 with bilateral foraminal stenosis at L5-S1.
6. Provider requested preauthorization for Claimant to undergo a lumbar discogram.
7. Onebeacon Insurance Company (Carrier) denied Provider's request for preauthorization.
8. Provider requested medical dispute resolution.
9. The Independent Review Organization (IRO) denied Provider's request for preauthorization.
10. Provider requested a hearing before the State Office of Administrative Hearings and requested preauthorization for a lumbar discogram.
11. Both 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; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
12. ALJ Penny A. Wilkov convened a hearing in this case on April 6, 2005, at the State Office of Administrative Hearings (SOAH), William P. Clements State Office Building, 300 West 15th Street, Austin, Texas. Attorney Brandi Prejean appeared on behalf of Carrier. Jacob Rosenstein, M.D., appeared by telephone.
13. A myelogram showed that Claimant had a protruding disc at L2-L3 but showed no need for surgery.
14. Surgical fusion is not advised at more than two disc levels, which has already occurred in this case and therefore lumbar discography would not offer any benefit in deciding future treatment.
15. Claimant has pain of unknown origin, has had a number of diagnostic procedures to determine the source of the pain, and surgery for disc degeneration is not necessary.
16. A lumbar discogram would not lead to relief of Claimant's symptoms, promote Claimant's recovery, or enhance her ability to retain employment and is not medically reasonable and necessary.

#### **IV. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing, including the authority to issue a decision and order. TEX. LABOR CODE ANN. §413.031(k).
2. Both parties received proper and timely notice of the hearing. TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
3. Provider has the burden of proof by a preponderance of the evidence.
4. Provider did not establish by a preponderance of the evidence that a lumbar discogram with CT scan is medically reasonable or necessary for the proper treatment of Claimant TEX. LABOR CODE ANN. §§401.011(19) and 408.021.
5. A lumbar discogram is not medically necessary and should not be preauthorized.

#### **ORDER**

**IT IS, THEREFORE, ORDERED** that preauthorization is hereby DENIED for a lumbar discogram as requested by Jacob Rosenstein, M.D., on behalf of Claimant.

**SIGNED April 26, 2005.**

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**PENNY A. WILKOV  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**