

**DOCKET NO. 453-05-4146.M5  
TWCC MR NO. M5-05-0848-01**

**COTTON D. MERRITT, D.C.,  
Petitioner**

**v.**

**OLD REPUBLIC INSURANCE CO.,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Cotton D. Merritt, D.C., (Petitioner) has challenged the decision of an Independent Review Organization (IRO) upholding a decision by Old Republic Insurance Company (Respondent) denying Petitioner reimbursement, on the basis of medical necessity, for certain electrodiagnostic testing performed on Claimant \_\_ (the disputed tests).<sup>1</sup> The Administrative Law Judge (ALJ) finds that Petitioner met his burden of establishing that the disputed tests were medically necessary and, therefore, he is entitled to reimbursement.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

The hearing convened on October 10, 2005, before ALJ Renee M. Rusch. Petitioner appeared *pro se* and by telephone. Respondent was represented by attorney John Fundis, who also appeared by telephone. Neither party challenged notice or jurisdiction. After the presentation of evidence and argument, the record closed the same day.

**II. DISCUSSION**

On \_\_, Claimant, a female in her early 60s, suffered a compensable low back injury while lifting a box of files. Claimant was initially diagnosed with lumbosacral strain. Petitioner has been her treating doctor since February 19, 2003. (Resp. Ex. A at 84.) Despite receiving various forms of conservative treatment, Claimant continues to experience pain in her low back, buttocks, and right leg. According to the medical records, she has consistently reported pain levels in the 3 to 5 range on a scale of 10.

An MRI performed on February 10, 2003, revealed a disk protrusion at the L2/L3 level with bulging at the L5-S1 level, as well as narrowing of the left and right foramen at the L4/L5 level. Objective findings on clinical examination reflected both sensory and motor abnormalities. (Pet. Ex. 1.) Petitioner interpreted this clinical information as suggesting a lumbar radiculopathy.<sup>1</sup> He believed the disputed tests were medically necessary to determine whether any changes should be made to Claimant's treatment plan. According to Petitioner, if the disputed tests had shown that Claimant had a lumbar radiculopathy, decompressive surgery might have been warranted and he would have referred her to a surgeon for further evaluation. The disputed tests were performed on January 13, 2004. The results of the disputed tests were negative, and Petitioner did not change Claimant's treatment plan. (Petitioner testimony and Pet. Ex. 1.) Respondent denied reimbursement for the disputed tests.

The IRO to which the Texas Workers' Compensation Commission<sup>2</sup> referred this dispute decided that the disputed tests were not medically necessary. However, obvious errors in the decision of the IRO reviewer (a medical doctor who is board-certified in neurological surgery) cast doubt on the reviewer's familiarity with Claimant's case. For example, the IRO reviewer incorrectly characterized Claimant as a male who injured his back in \_\_\_ while lifting 100-pound objects over his head. (Resp. Ex. A at 3.)

The ALJ must determine the facts in keeping with the requirements of the preponderance of the evidence rule. Preponderance of the evidence refers to the greater weight of the evidence. Given the glaring errors in the IRO decision, the ALJ could not determine which portions of the IRO reviewer's opinion, if any, were credible. Thus, she could not attach much weight to the IRO decision. Petitioner, on the other hand, was Claimant's treating doctor and intimately familiar with her symptoms and treatment. He testified that he would have referred Claimant to a surgeon for evaluation had the disputed tests disclosed a radiculopathy and, presumably, the surgeon would then have assessed the feasibility of surgery in Claimant's circumstances.<sup>3</sup>

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<sup>1</sup> A radiculopathy is a progressive deterioration of the nerve root from irritation at the level of the spinal cord.

<sup>2</sup> Effective September 1, 2003, the functions of the Commission have been transferred to the newly created Division of Workers' Compensation at the Texas Department of Insurance.

<sup>3</sup> The ALJ recognizes that before Petitioner performed the disputed tests, at least three doctors had opined that

On the evidence presented, the ALJ concludes that Petitioner carried his burden of establishing that the disputed tests were medically necessary.

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

1. On\_\_\_, Claimant suffered a compensable low back injury while lifting a box of files.
2. At the time of Claimant's injury, Old Republic Insurance Company (Respondent) was the workers' compensation insurer for her employer.
3. Cotton D. Merritt, D.C. (Petitioner) has been Claimant's treating doctor since February 19, 2003.
4. Claimant was initially diagnosed with lumbosacral strain.
5. Claimant has degenerative disk disease at multiple levels.
6. Claimant has received various forms of conservative treatment but continues to experience pain in her low back, buttocks, and right leg.
7. The services at issue in this proceeding comprise motor nerve conduction testing, sensory nerve conduction testing, H-reflex testing, and muscle testing (two limbs) performed on January 13, 2004 (the disputed tests).
8. An MRI performed on February 10, 2003, revealed a disk protrusion at the L2/L3 level with bulging at the L5-S1 level, as well as narrowing of the left and right foramen at the L4/L5 level.
9. Objective findings on clinical examination of Claimant reflected sensory and motor abnormalities and suggested the possibility that Claimant had a lumbar radiculopathy.
10. The primary purpose of the disputed tests was to determine whether Claimant had a radiculopathy that might be treated surgically.
11. If the disputed tests had shown that Claimant had a lumbar radiculopathy, Petitioner would have referred her to a surgeon for evaluation.
12. Respondent denied reimbursement for the disputed tests.

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Claimant was not a surgical candidate: Dr. John Pracyk, a neurosurgeon; Dr. Jeremiah Twomey, an internist; Dr. Dmitry Golovko, a doctor designated by the Commission. (Pet. Ex. 1 at 9; Pet. Ex. 2 at 2; Resp. Ex. A at 86-91, 108, 109.) The doctors based their opinions, to a large extent, on the observation that Claimant is diabetic and has multiple levels of degenerative disk disease. However, they also assumed that Claimant did not have a condition that could be corrected surgically.

13. Petitioner filed a request for dispute resolution with the Texas Workers' Compensation Commission's (Commission's) Medical Review Division (MRD).
14. An independent review organization (IRO) to which the MRD referred the dispute found that the disputed tests were not medically necessary.
15. On February 14, 2005, the Commission issued a notice of hearing, which stated the date, time, and location of the hearing; cited the statutes and rules involved; and provided a short, plain statement of the factual matters asserted.
16. The hearing was held on October 10, 2005, at the William P. Clements Building, 300 W. 15<sup>th</sup> Street, Austin, Texas, before ALJ Renee M. Rusch. Both parties appeared by telephone and presented evidence and argument. The record closed on the same date.

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

1. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§402.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. Petitioner requested a hearing on the IRO determination pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 133.308(u) and 148.3(a).
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 and 28 TAC 148.5(a).
4. Petitioner had the burden of proof by a preponderance of the evidence. 28 TAC §148.14.
5. 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 that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021.
6. Based upon the foregoing Findings of Fact and Conclusions of Law, the disputed tests Petitioner provided to Claimant were medically necessary health care under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
7. Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's request for reimbursement should be granted.

#### **ORDER**

**IT IS ORDERED THAT** Old Republic Insurance Company reimburse Cotton Merritt, D.C., for the disputed tests provided to Claimant on January 13, 2004.

**SIGNED December 5, 2005.**

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**RENEE M. RUSCH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>1</sup> The disputed tests comprised motor nerve conduction testing, sensory nerve conduction testing, H-reflex testing, and muscle testing (two limbs) performed on January 13, 2004. The amount in dispute is \$1,142.66.