

**DOCKET NO. 453-05-7743.M2
TWCC MR NO. M2-05-1802-01**

**AMERICAN HOME
ASSURANCE COMPANY,
Petitioner**

v.

**ROBERT J. HENDERSON, M.D.
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

American Home Assurance Company (American Home) requested a hearing to contest an independent review organization (IRO) determination, issued on behalf of the Texas Workers' Compensation Commission (Commission), concluding that a lumbar discogram requested by Robert J. Henderson, M.D., for an injured worker (Claimant) was medically necessary and should be pre-authorized. Dr. Henderson did not appear and was not represented at the hearing. On the basis of the evidence presented by American Home, the Administrative Law Judge (ALJ) finds that the lumbar discogram is medically unnecessary and the pre-authorization request should be denied.

I. PROCEDURAL HISTORY

The hearing in this case convened on August 3, 2005, before the undersigned ALJ. American Home appeared and was represented by Christopher S. Norton, Attorney. American Home presented evidence to prove that the address shown on the notice of hearing, mailed to the parties by the Commission on July 18, 2005, was the same address that appears on correspondence from Dr. Henderson. American Home received the notice of hearing. The ALJ finds there was sufficient evidence to conclude that the notice was mailed to Dr. Henderson and to raise an evidentiary presumption that he received the notice.

II. DISCUSSION

A. Factual and Legal Background

The Claimant suffered a compensable injury on ____, when a cigarette machine that was being taken down from an elevated position slipped from the grasp of other employees, fell sideways, and pinned her to the ground. She was diagnosed with spondylosis at her L4/L5 and L5/S1 spinal levels, central stenosis at L4/L5, and radiculopathy on the right side.

The Claimant underwent chiropractic care and physical therapy, but when her pain persisted, her treating doctor, Brian Saul, D.C., referred her to Dr. Henderson. Dr. Henderson requested a lumbar discogram to further diagnosis the Claimant's condition. On April 22, 2005, American Home denied the request.

Dr. Henderson requested medical dispute resolution. The IRO decision was issued on June 24, 2005.¹ On June 27, 2005, the Commission's Chief Clerk of Proceedings received American Home's request for a hearing to contest the IRO determination.

Employees have a right to necessary health care 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 Petitioner, American Home had the burden of proof.²

¹ The ALJ takes official notice of the date the IRO decision was issued.

² 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TAC § 148.14(a).

B. Analysis

The ALJ concludes the request for pre-authorization of a lumbar discogram should be denied. As indicated above, Dr. Henderson did not appear and present any evidence to support the request. American Home introduced documentary evidence and called Melissa Tonn, M.D., to testify.³ Dr. Tonn is board certified in pain management and occupational medicine. She testified persuasively that the discogram is medically unnecessary because, to even consider a discogram, there must be some indication of a need for a spinal fusion and there is not in this case. According to Dr. Tonn, the indications for a spinal fusion are lumbar instability, spinal fracture, or spondylolisthesis. She maintained these are not present in this case and discography is therefore unnecessary.

Dr. Tonn also asserted that two magnetic resonance imaging (MRI) studies and a CT myelogram indicate an absence of correctable pathology. She referred to opinions from a designated doctor and a referral doctor saying the Claimant's condition will not improve.

Dr. Tonn cited the IRO decision, which, she said, relied on American College of Occupational and Environmental Medicine (ACOEM) guidelines to conclude the discogram should be preauthorized. Dr. Tonn testified the IRO doctor misread the guidelines, which, she asserted, say that discography is a subjective study that can be used when fusion is already a realistic consideration, but not to support the need for surgery when there is no other indication.

In support of its point of view, American Home cited a designated doctor opinion concluding that the Claimant had a three percent impairment rating;⁴ an opinion from the Claimant's former treating doctor saying he did not recommend surgery at that time;⁵ and a letter from the Claimant's chiropractor⁶ saying she has declined any surgical procedure for her injury.

³ American Home did not tender the IRO decision into evidence.

⁴ Ex. 1 at 22-22.

⁵ Ex. 1 at 27.

⁶ Ex. 1 at 3.

III. FINDINGS OF FACT

1. The Claimant suffered a compensable injury on ____, when a cigarette machine that was being taken down from an elevated position slipped from the grasp of other employees, fell sideways, and pinned her to the ground.
2. The Claimant's doctor diagnosed her condition as spondylosis at her L4/L5 and L5/S1 spinal levels, central stenosis at L4/L5, and radiculopathy on the right side.
3. The Claimant underwent chiropractic care and physical therapy, but her pain persisted.
4. The Claimant's treating doctor referred her to Robert J. Henderson, M.D.
5. Dr. Henderson requested a lumbar discogram to further diagnose the Claimant's condition.
6. On April 22, 2005, American Home Assurance Company (American Home), the workers' compensation insurance carrier for the Claimant's employer, denied the request on the basis of a lack of medical necessity.
7. Dr. Henderson requested medical dispute resolution.
8. An independent review organization (IRO) issued a decision on June 24, 2005, on behalf of the Texas Workers' Compensation Commission (Commission), concluding that the discogram was medically necessary.
9. By letter dated June 27, 2005, American Home requested a hearing to contest the IRO decision.
10. The Commission's Chief Clerk of Proceedings received American Home's request for hearing on June 27, 2005.
11. The Commission properly mailed a notice of hearing to the parties at their addresses of record on July 18, 2005.
12. All parties received adequate notice of not less than 10 days 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.
13. The hearing convened on August 3, 2005.
14. American Home appeared through its counsel, but Dr. Henderson did not appear.

15. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
16. Without any indication of a need for spinal fusion, a discogram is not reasonably medically necessary.
17. The indications for a spinal fusion-lumbar instability, spinal fracture, or spondylolisthesis-are not present in this case.
18. The lumbar discogram is not reasonably required by the nature of the Claimant's injury.

IV. CONCLUSIONS OF LAW

1. 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. TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
3. American Home had the burden of proving that the discogram was not medically necessary. 1 TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148.14(a).
4. American Home proved that the discogram was not medically necessary.
5. American Home should not be required to pay for the discogram.

ORDER

IT IS THEREFORE ORDERED that the request of Robert J. Henderson, M.D., for preauthorization of a lumbar discogram to diagnose the Claimant's condition be, and the same is hereby, **denied**.

SIGNED August 29, 2005

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