

SOAH DOCKET NO. 453-04-1357.M2

—,	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner,</b>	§	
	§	
<b>VS.</b>	§	
	§	<b>OF</b>
<b>TEXAS WORKERS’ COMPENSATION</b>	§	
<b>COMMISSION AND UNITED STATES</b>	§	
<b>FIRE INSURANCE CO.,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondents.</b>	§	

**DECISION AND ORDER**

— (Petitioner) is the Claimant and Petitioner in this case. He is appealing an Independent Review Organization’s (IRO) determination that United States Fire Insurance Company (Carrier) correctly denied his preauthorization request for additional diagnostic testing ordered by his orthopedic surgeon in preparation for a spinal fusion surgery. The Administrative Law Judge (ALJ) finds that Petitioner failed to prove the medical necessity of the bilateral lower extremity electromyography nerve conduction velocity study, but succeeded in proving that he is entitled to the reasonable and medically necessary discogram and lumbar CT tests. She, therefore, orders Carrier to approve the request for the discogram and the lumbar CT tests.

**I. Notice, Jurisdiction, and Procedural History**

Notice and jurisdiction were not disputed and are established in the findings of fact and conclusions of law. ALJ Deborah L. Ingraham convened the hearing on January 6, 2004, at the State Office of Administrative Hearings (SOAH) in Austin, Texas. Petitioner appeared by telephone; Commission Ombudsman Barton Levy assisted him. Attorney Dan Kelly represented Carrier. The Staff of the Texas Workers’ Compensation Commission (Commission) did not participate in this proceeding. The ALJ adjourned the hearing the same day and the record closed January 27, 2004, after the parties’ submitted citations to the documentary evidence supporting their respective positions.

## II. Reasons for Decision

### **A. Background**

Petitioner sustained a compensable worker's compensation injury to his back on \_\_\_\_\_. He has been treated since then with numerous rhizotomies and facet blocks. Petitioner's orthopedic surgeon, Robert T. Myles, M.D., now recommends spinal fusion surgery and wants to order additional diagnostic testing to determine precisely which disc levels he should fuse given that Petitioner has disc bulges at L2-L4; L4-L5; and L5-S1.<sup>1</sup> Dr. Myles specifically wants to order 1) a bilateral lower extremity electromyography (EMG) nerve conduction velocity study; 2) a discogram; and 3) a lumbar CT. Carrier refused to preauthorize these tests and the Commission, through the IRO, agreed with that refusal.

### **B. ALJ's Analysis**

#### **1. EMG Nerve Conduction Velocity Study**

In the IRO's opinion, the EMG nerve conduction study was properly denied because Petitioner does not manifest a neurological deficit, myopathy or neuropathy. According to Dr. Myles' records, Petitioner complains of constant low back pain and numbness in his legs. Carrier argues that an EMG nerve conduction study is not necessary because Petitioner exhibits a normal neurologic exam with no documentation of "significant" radiculopathy to indicate a study is needed to diagnose a neurocompressive lesion. Carrier also asserts that an EMG nerve conduction is not the study of choice for determining the cause of a painful disc.<sup>2</sup> The ALJ agrees with Carrier that Dr. Myles' notes regarding the need for this study are sketchy. She, therefore, finds that Petitioner has failed to prove the EMG nerve conduction study is medically necessary.

#### **2. Discogram and CT Lumbar Tests**

The IRO determined that the discogram and lumbar CT are not medically necessary because a note in the medical records indicated that Petitioner does not want to have the surgery.<sup>3</sup> At the

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<sup>1</sup> Pet. Ex. 1 at p. 5.

<sup>2</sup> Carrier's Ex. 1 at p. 15.

<sup>3</sup> Pet. Ex. 1 at p. 2.

hearing, Petitioner testified that he wants the surgery, explaining that the note in his medical records to the contrary resulted from a miscommunication. Because the IRO based its rationale for denying the discogram and lumbar CT on that miscommunication, Claimant's testimony seems to put the matter to rest. However, Carrier argues that those two tests are still not medically necessary because Dr. Myles can rely on the MRI test results from November 14, 2002, and the CT results from December 18, 2002, to plan the surgery.

The MRI showed a 2 millimeter (mm) central and left paracentral disc protrusion that flattens the ventral aspect of the thecal sac. It also showed a bilateral 2 mm posterolateral annular disc bulge at L2-L4 and a 2 mm broad annular disc bulge at L4-L5 that flattens the ventral aspect of the thecal sac. The CT test result showed minimal bulging of the annulus without disc protrusion at L5-S1 and reiterated the MRI reading. But the flexion and extension of Petitioner's lumbar spine showed significant instability at L5-S1 in that it shifts from 40 degrees to 12 degrees in the sagittal plane. Dr. Myles has diagnosed Petitioner with radicular symptoms and thinks a discogram, lumbar CT, and EMG nerve conduction study from L2 to S1 will help him determine which discs are causing pain and need to be fused insofar as it is unrealistic to fuse Petitioner's spine from L2 to S1.<sup>4</sup>

To support its preauthorization denials, Carrier relies on an independent evaluation by John A. Sklar, M.D., in which Dr. Sklar opined that Petitioner needed no further diagnostic testing. Dr. Sklar reported on August 9, 2002, that Claimant's physical condition had essentially not changed since his last examination in August 2000. He concluded that the duration of Claimant's complaints were related to his compensable injury; his medications and infrequent rhizotomies were appropriate; and no additional diagnostic testing was necessary.<sup>5</sup> However, the ALJ must give this evidence less weight compared to Dr. Myles' opinions because it does not appear from the context of the report that Dr. Sklar was evaluating Petitioner's need for diagnostic testing in preparation for a spinal surgery where multiple levels show bulges and protrusions.

Carrier's pre-authorization department stated on July 18, 2003, that when surgery is

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<sup>4</sup> Carrier's Ex. 1 at p. 13, 31.

<sup>5</sup> Carrier's Ex. 1 at p. 98.

considered, a discogram and lumbar CT are pre-operative tests to help determine levels of operation and are performed at levels where there is a questionable, suggestive, or abnormal disc.<sup>6</sup> The ALJ finds that the evidence shows Petitioner has multiple abnormal discs from L2 through S1, with the L5-S1 level being particularly questionable. Moreover, surgery is planned. Therefore, the discogram and CT lumbar diagnostic tests are medically necessary and the Texas Workers' Compensation Act entitles Petitioner to these additional diagnostic tests.<sup>7</sup>

### **III. Findings of Fact**

1. \_\_\_\_ (Ppetitioner) sustained a work-related injury to his back on \_\_\_\_.
2. At the time of Petitioner's injury, his employer had workers' compensation coverage through United States Fire Insurance Company (Carrier).
3. Petitioner's orthopedic surgeon, Robert T. Myles, M.D., recommends that Petitioner undergo spinal fusion surgery because the benefits from years of conservative care have been exhausted. Petitioner agrees to the have the surgery.
4. On July 15, 2003, Dr. Myles requested preauthorization for additional pre-operative diagnostic tests to determine precisely which disc levels he should fuse given that Petitioner

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<sup>6</sup> Carrier's Ex. 1 at p. 23.

<sup>7</sup> The Texas Labor Code contains the Texas Workers' Compensation Act (Act), which sets forth the statutory requirements regarding compensable treatment for workers' compensation claims. The Act provides in pertinent part that:

1. 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.

\* \* \*

Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.

has disc bulges at L2-L4, L4-L5, and L5-S1, with significant instability at L5-S1.

5. Carrier denied the preauthorization request for a bilateral lower extremity electromyography (EMG) nerve conduction velocity study, a discogram, and a lumbar CT test.
6. Petitioner requested medical dispute resolution before the Texas Workers' Compensation Commission (Commission), which referred the dispute to an Independent Review Organization (IRO).
7. The IRO agreed with Carrier's denials due to the lack of documentation in Petitioner's medical record indicating significant radiculopathy and Petitioner's lack of interest in having spinal surgery.
8. The Petitioner appealed the IRO determination in a contested hearing convened before the State Office of Administrative Hearings (SOAH) on January 6, 2004, after issuance of a notice of hearing on December 5, 2003, giving the time, place, and nature of the hearing and the statutes, rules, and contested issues involved.
9. Because significant radiculopathy is not recorded in Petitioner's medical records, an EMG nerve conduction study is not a necessary pre-operative diagnostic test.
10. A discogram and a lumbar CT are appropriate pre-operative diagnostic tests performed at levels of the spine where there are questionable, suggestive, or abnormal discs.
11. Petitioner has questionable, suggestive, or abnormal discs from L2 to S1, and a discogram and lumbar CT are necessary diagnostic tests to determine which of those levels most require fusion.

#### **IV. Conclusions of Law**

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act (Act), TEX. LABOR CODE ANN. § 413.031.
2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(d) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
5. As the party seeking relief, Petitioner bore the burden of proof in this case pursuant to 28 TEX. ADMIN. CODE § 148.21(h).
6. Petitioner established that a discogram and lumbar CT are medically necessary pre-operative diagnostic tests, but failed to establish that an EMG nerve conduction velocity study is a medically necessary pre-operative diagnostic test for his spinal fusion.
7. Based on the foregoing findings of fact, the discogram and lumbar CT diagnostic tests are reasonable and medically necessary health care to which Petitioner is entitled as contemplated in § 408.021 of the Act.
8. Based on the foregoing findings of fact, the EMG nerve conduction velocity study is not reasonable and medically necessary health care for Petitioner as contemplated in §408.021 of the Act.

**ORDER**

**IT IS THEREFORE ORDERED** that the Carrier shall preauthorize the pre-operative discogram and lumbar CT diagnostic tests ordered for the Petitioner.

**SIGNED this 9<sup>th</sup> day of March, 2004.**

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**DEBORAH L. INGRAHAM  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**