

**DOCKET NO. 453-04-5976.M2
MDR NO. M2-04-1168-01**

AMERICAN HOME ASSURANCE CO.,	·	BEFORE THE STATE OFFICE
Petitioner	·	
	·	
v.	·	OF
	·	
KENNETH BERLINER, M.D.,	·	
Respondent	·	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Kenneth Berliner, M.D. (Provider) sought preauthorization for a lumbar discogram with CT scan for injured worker ___ (Claimant). American Home Insurance Company (Carrier) determined that the procedure was unnecessary and denied the request for preauthorization. An Independent Review Organization (IRO) determined the requested treatment was medically necessary. In this decision, the Administrative Law Judge (ALJ) agrees with the IRO determination and concludes that the requested procedure should be preauthorized.

I. Jurisdiction, Notice, and Procedural History

There were no contested issues regarding jurisdiction or notice, and those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

Claimant suffered a work-related injury to her lower back on ___, while moving boxes. Thereafter, Claimant received various medical treatments, including physical therapy, active rehabilitation, and medication. When Claimant continued to suffer pain from her injury, she visited Provider, who is board-certified in orthopedic surgery. Provider reviewed two MRIs that had been performed previously on Claimant and concluded that they demonstrated a midline disc herniation at L5-S1. Based on Provider ' s interpretation of the MRIs and Claimant ' s continued pain, Provider determined it would be appropriate to have a lumbar discogram with CT scan performed on Claimant to confirm whether she would be a candidate for surgery. Provider then requested preauthorization for the lumbar discogram with CT scan.

Carrier denied the preauthorization request, concluding the procedure was not medically necessary. Provider then requested medical dispute resolution. The matter was referred to an IRO designated by the Texas Workers' Compensation Commission (Commission) for the review process. The IRO determined the lumbar discogram with CT scan was medically necessary and should be authorized. Carrier requested a hearing on the IRO decision, and the matter was referred to the State Office of Administrative Hearings (SOAH). The evidentiary hearing convened and the record closed on August 26, 2004, before ALJ Craig R. Bennett. Carrier appeared and was represented at the hearing by attorney Jim Koriath; Provider appeared by telephone and represented himself.

II. Discussion

As both parties aptly stated at the hearing, this case essentially involves a swearing match over the efficacy of lumbar discograms in general and the specific necessity for such a procedure for Claimant. After considering the evidence presented, the ALJ concludes that Carrier has not met its burden of proving that the requested procedure is not medically necessary. Accordingly, the ALJ determines that the requested procedure should be authorized.

A. Parties' Arguments and Evidence

At the hearing, Carrier presented the testimony of Melissa Tonn, M.D., who has been a licensed physician for more than fifteen years and who assisted in the development of treatment guidelines used by the Texas Workers' Compensation Commission. Without detailing Dr. Tonn's credentials at length here, suffice to say that they are significant. In her testimony, Dr. Tonn stated that the use of discograms is increasingly being questioned, and the literature in recent years has suggested that discograms are of little efficacy and can even result in negative consequences to patients. Moreover, even if a discogram was useful, Provider's intended purpose for it in this case is to determine whether Claimant is an appropriate surgical candidate. Based on the medical

documentation she has reviewed, Dr. Tonn testified that Claimant would not be an appropriate candidate for surgery regardless of the discogram results. Therefore, Dr. Tonn concluded that a discogram with CT scan is not medically necessary.

In response, Provider offered his own testimony. Provider has been a licensed physician for at least twelve years and is board-certified in orthopedic surgery. He is at the highest level on the Commission's approved doctors list and conducts designated doctor evaluations for the Commission. Provider testified that, while there are past studies questioning the efficacy of discograms, the procedure has been recognized as valid by the North American Spine Society and the American Academy of Orthopedic Surgeons. In his opinion, discograms are beneficial as a diagnostic tool for certain types of back injuries and for determining appropriate treatment.

In his testimony, Provider also disagreed with Dr. Tonn's conclusion that Claimant was not an appropriate candidate for surgery. Specifically, Provider noted that he had reviewed the two MRIs performed on Claimant and concluded that they indicated Claimant had spinal instability, which is a factor in making a patient an appropriate candidate for surgery. Although Dr. Tonn disagreed with this conclusion, she never actually reviewed the MRIs. Therefore, Provider argues that her opinion should be given limited weight. Further, Provider points out that Dr. Tonn has never performed a discogram or a lumbar fusion surgery (which is the anticipated surgery for Claimant), another reason that Provider asserts Dr. Tonn 's opinion should be given limited weight.

B. ALJ's Analysis

As noted in a recent SOAH decision, the fact that there is some disagreement in the medical community over the benefit of discograms merely implies that there are different medical points of view.¹ The disagreement between Dr. Tonn and Provider two highly qualified physicians seems to reflect these broader controversies in the medical community regarding the efficacy of discograms.

¹ See SOAH Docket No. 453-04-6425.M2, Decision and Order (August 5, 2004) (ALJ Kilgore).

Ultimately, the ALJ need not conclusively decide the efficacy of discograms in all instances. Rather, the ALJ concludes that, given the testimony presented by both parties, Carrier has not shown by a preponderance of the evidence that the procedure has little efficacy (as it has asserted). Therefore, the ALJ must address whether the procedure would be beneficial specifically for Claimant.

In determining whether a discogram would be a medically necessary diagnostic procedure in regard to Claimant, Carrier has focused on the fact that its medical necessity is predicated on the underlying assumption that Claimant is an appropriate candidate for surgery. Carrier disagrees with this assumption. Dr. Tonn testified that surgery would be appropriate for Claimant only under limited circumstances, one of which includes spinal instability. Dr. Tonn concluded there was no showing in the medical records that Claimant had spinal instability. Dr. Tonn disagreed with Provider ' s conclusion that the MRIs showed disc herniation and, thus, spinal instability. However, Dr. Tonn never reviewed the MRIs herself and has never seen Claimant. Moreover, as Provider pointed out, he is trained and practices specifically in the area of orthopedic surgery, treating spine problems on a daily basis and participating in spine surgery on a regular basis. In contrast, Dr. Tonn does not practice in the area of spine surgery and has never performed a discogram or a spinal fusion. Rather, Dr. Tonn is board-certified in occupational medicine and has limited orthopedic training.

Ultimately, the assignment of the burden of proof is dispositive in this case. Because Carrier has the burden of proof it must show by a *preponderance* of the evidence that the requested procedure is not medically necessary. However, the ALJ does not find that Dr. Tonn's testimony is more credible than Dr. Berliner's testimony (particularly when Dr. Berliner is the treating physician, practices in the specific specialty area in issue, and actually reviewed the MRIs in question. Even if the ALJ were to find Dr. Tonn's testimony equally persuasive as Provider ' s testimony, that would still be insufficient to meet Carrier's burden of proof. In this case, because Carrier's evidence does not satisfy its burden, the ALJ finds insufficient grounds to conclude that the requested discogram

with CT scan is not medically necessary. Because Carrier has not met its burden of proof, the requested procedure should be preauthorized. In support of this decision, the ALJ makes the following findings of fact and conclusions of law.

III. Findings of Fact

1. ____ (Claimant) suffered a compensable injury to her lower back on ____, while moving boxes.
2. At the time of Claimant's compensable injury, American Home Assurance Company (Carrier) was the workers' compensation insurer for Claimant's employer.
3. Claimant received various medical treatments, including physical therapy, active rehabilitation, and medication.
4. When Claimant continued to suffer pain from her injury, she visited Dr. Kenneth Berliner (Provider), who is board-certified in orthopedic surgery.
5. Provider reviewed two MRIs that had been performed previously on Claimant and concluded that they demonstrated a midline disc herniation at L5-S1.
6. Based on Provider's interpretation of the MRIs and Claimant's continued pain, Provider requested preauthorization for a lumbar discogram with CT scan to confirm whether Claimant would be a candidate for surgery.
7. Carrier denied the preauthorization request, concluding the requested procedure was not medically necessary.
8. Provider then requested medical dispute resolution by the Texas Workers' Compensation Commission's Medical Review Division, which referred the matter to an Independent Review Organization (IRO).
9. On May 6, 2004, after conducting medical dispute resolution, the IRO physician reviewer determined that a lumbar discogram with CT scan was medically necessary and should be authorized.
10. On May 7, 2004, Carrier requested a hearing on the IRO decision, and the case was referred to the State Office of Administrative Hearings (SOAH).

11. Notice of the hearing was sent to all parties on June 1, 2004, and contained a statement of the time, place, and nature of the hearing; a statement of 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. The hearing convened on August 26, 2004, before ALJ Craig R. Bennett. Carrier appeared and was represented at the hearing by attorney Jim Koriath; Provider appeared by telephone and represented himself. The record closed that same day.

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, pursuant to 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003 .
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Carrier has the burden of proof. 28 TEX. ADMIN. CODE §§148.21(h) and 133.308(w).
5. Carrier has failed to prove, by a preponderance of the evidence, that the requested lumbar discogram with CT scan is not medically necessary treatment for Claimant's compensable injury.
6. Provider's request for preauthorization should be granted.

ORDER

IT IS, THEREFORE, ORDERED that preauthorization is granted for a lumbar discogram with CT scan, as requested by Dr. Kenneth Berliner.

SIGNED August 31, 2004.

**CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**