

DOCKET NO. 453-04-6425.M2

_____,
Petitioner

VS.

AMERICAN HOME ASSURANCE CO.,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Claimant _____, through her doctor, sought pre-authorization for a cervical discogram with CT scan. American Home Insurance Company (Carrier) determined that the procedure was unnecessary and denied the request for pre-authorization. A reviewer with an Independent Review Organization (IRO) agreed with Carrier. The Administrative Law Judge concludes that the requested procedure is reasonable and necessary and should be pre-authorized.

I. JURISDICTION, NOTICE, & HEARING

Notice and jurisdiction are addressed in the findings of fact and conclusions of law.¹ ALJ Shannon Kilgore conducted a hearing in this case on July 14, 2004, at SOAH's hearings facility, located in the William P. Clements State Office Building, Austin, Texas. _____ appeared on her

¹ Carrier noted a procedural problem with this case. Carrier pointed out that the rules of the Texas Workers' Compensation Commission (Commission) require that a request for medical dispute resolution be made within 45 days of the carrier's denial of a request for reconsideration. 28 TEX. ADMIN. CODE ' 133.308. Carrier argued that the rule contemplates that only one request for pre-authorization be made. Carrier went on to assert that _____ and her doctor, instead of following this procedure, submitted four consecutive requests for pre-authorization. The right to ask for dispute resolution, suggests Carrier, has been waived because it was not exercised within 45 days of the denial of the request for reconsideration concerning the original request for pre-authorization. However, it does not appear that Carrier raised this issue in the dispute resolution process before the Commission. As a result, the medical dispute resolution went forward, culminating in a review and decision by an IRO reviewer. The ALJ notes that, while the rules in general do seem to contemplate only one request for pre-authorization of a procedure in the absence of a change in the injured worker's medical condition, *see* 28 TEX. ADMIN. CODE ' 134.600, the rules do not state what should happen if pre-authorization for the same procedure is requested, and denied, several times. For this reason, and because it does not appear the Carrier has ever raised this issue previously in the course of this dispute, the ALJ determines that the contested case hearing process on the medical necessity issue should go forward.

own behalf, assisted by Barton Levy, Ombudsman with the Commission. Attorney Steven Tipton appeared on behalf of Carrier. The hearing concluded and the record closed the same day.

II. DISCUSSION

1. Background and Medical History

_____ is in her mid-thirties. At the time of her injury, she had worked as a flight attendant for _____ for about 12 years. On _____, she was on an airport escalator and a large piece of luggage fell down onto her. She rode to the top of the escalator with the luggage on top of her. She has had debilitating neck pain, with some pain, numbness, and/or tingling in her right arm (and sometimes her hand) ever since. Pain has limited her cervical range of motion.

On the day of the injury, _____ went to the _____ clinic at the DFW Airport. Later that month she began seeing Joseph G. Jacko, M.D., an orthopedist. _____ underwent more than two months of physical therapy, which offered little relief. An MRI showed a 2-millimeter central disc protrusion at C5-C6 mildly flattening the thecal sac and abutting the cord surface, but not compressing the cord. EMG and nerve conduction studies were normal. _____ received epidural steroid injections in the spring of 2003, with no lasting benefit. A myelogram with CT scan showed a slight bulge at the C5-6 level and facet joint hypertrophy on the right at C2-3 and C3-4. In June

2003, Dr. Jacko referred _____ to Kevin Gill, M.D., also an orthopedist. Dr. Gill interpreted _____'s MRI of the cervical spine to show a high-intensity zone lesion at the C5-6 level. He concluded that ' may have internal disc disruption, and recommended a 3-level CT discogram to evaluate and assess with the consideration of interbody fusion for disc disruption syndrome at C5-C6. ²

Dr. Gill requested pre-authorization for a CT discogram several times. Carrier denied the request the first time on the grounds that a discogram is a pre-surgical procedure, and it was premature. The subsequent two requests were denied because:

[O]nly one level of deformity exists by MRI B further studies are not necessary to prove that it is abnormal. Discography has not proven to be of value in patients such as this. Anecdotal evidence exists, but good clinical trial data does not. Peer reviewed journals fail to demonstrate the clinical utility of this subjective test. The clinical utility of lumbar discography remains under evaluation. Clinical trials have not substantiated the diagnostic and prognostic value of lumbar discography for the purpose of determining likely success versus failure from segmental stabilization procedures. . . ³

The final request was denied because:

Discography is a controversial study the results of which can be skewed by a variety of factors. A positive discogram does not necessarily ensure elimination of pain with appropriate satisfactory treatment. Also, there are no established NASS guidelines for this study. ⁴

² Petitioner Exhibit 1 at 41.

³ Petitioner Exhibit 1 at 43, 45.

⁴ Petitioner Exhibit 1 at 56.

B. The IRO Decision

The IRO reviewer stated that _____'s MRI, CT myelogram, EMG/NCV study, and examination are inconsistent with symptomatic disc herniation. The IRO decision went on to say that discograms are controversial, their results can be skewed by various factors, and a positive test does not guarantee elimination of pain with treatment.

C. Testimony

Both parties offered expert medical testimony. Dr. Gill testified for _____. He is a graduate of the Baylor College of Medicine in Houston and has been board-certified in orthopedic surgery since 1988. He believes that the source of _____'s pain may be an internal disc problem such as an annular tear, and he interprets _____'s MRI films to show a high intensity zone lesion at C5-6, which is suggestive of an annular tear at that level. He identified three possible courses of action for _____ at this point: (1) continued conservative care; (2) cervical arthroplasty;⁵ or (3) an anterior cervical fusion procedure. He stated that he would use the provocative part of the discogram to try to assess if surgery should be performed. Only if the test clearly showed C5-6 to be the level from which the pain originates would he recommend surgery. On cross-examination, Dr. Gill acknowledged that there are studies that call into question the reliability of discograms, especially in people who, like _____, are experiencing a chronic pain process. However, Dr. Gill also stated there are studies that indicate positive outcomes where multiple tests point to a single area as being a problem. He further acknowledged that the radiologist's report does not mention a high-intensity zone lesion, that high-intensity-zone lesions are as often asymptomatic as symptomatic, and that discograms of the cervical spine may be harder to interpret than discograms of the lumbar spine. He has ordered cervical discograms quite infrequently only approximately 4 times per year for 20 years.

⁵ Dr. Gill indicated that this surgery would have to be performed as part of one of a number of studies being carried out in the United States.

Carrier offered the testimony of Dr. Richard Shirley, a board-certified orthopedic surgeon and graduate of the University of Michigan's medical school who did his surgical residency at the University of Iowa and a fellowship at the Cleveland Clinic. Dr. Shirley is now retired from practice. He testified that he had reviewed _____'s records and could not see the utility of a discogram, because her diagnostics were unimpressive and completely lacking in objective findings. He said he had spoken to Dr. Gill, who had no specific plan for _____ in the event of a positive discogram. Dr. Shirley further stated that there is no standard for what constitutes a positive discogram, and noted that the North America Spine Society guidelines say one should never use a discogram alone to determine whether to perform surgery. He alluded to studies that indicate high intensity zone lesions are often asymptomatic, and noted that the significance of high intensity zone findings is highly controversial. He believes the literature indicates that provocative discograms are quite unreliable. He noted that Carrier's denial of pre-authorization was based on an opinion by a physician-advisor. On cross-examination, he acknowledged that cervical discograms have been approved by the Food and Drug Administration for 20 years. Dr. Shirley stated he has never ordered a cervical discogram for a patient.

_____ testified about her injury, her symptoms, and her course of treatment. She said Dr. Gill had discussed the possibility of surgery with her.

4. ALJ's Analysis

This is a close case. Carrier certainly established that the use of discograms and the significance of high intensity zone lesion findings are controversial matters. And it is clear that Carrier's denials of the requests for pre-authorization in this case are based in part on studies in the medical literature that question the reliability of discogram results and their utility in the treatment process. However, that there is controversy implies that there are different points of view in the debate. The disagreement between Drs. Gill and Shirley B two highly qualified orthopedic surgeons

and excellent witnesses seems to reflect these broader controversies in the medical community. Drs. Gill and Shirley simply do not agree about whether a discogram would yield any useful information relevant to treatment decisions for _____. Dr. Gill's testimony was clear, specific, and consistent: he believes that _____'s unrelenting pain and the high intensity zone lesion shown on the MRI would, *if* the provocative discogram were positive at the C5-6 level, constitute sufficient evidence of a painful annular tear at that level to justify surgery. It appears that the IRO reviewer did not have the actual MRI films⁶ and therefore did not have the benefit of knowing that the MRI could be interpreted to indicate a high intensity zone lesion; at any rate, the reviewer did not mention any such lesion. The ALJ finds Dr. Gill's testimony credible and persuasive. Under these circumstances, the ALJ determines that _____ has met her burden to show that the requested discogram is necessary and that the IRO decision should be overturned.

III. FINDINGS OF FACT

1. On _____, claimant _____ was on an airport escalator when a large piece of luggage fell down onto her. She rode to the top of the escalator with the luggage on top of her. At the time of the accident, she had worked as a flight attendant for _____ for about 12 years.
2. _____ has had debilitating neck pain, with some pain, numbness, and/or tingling in her right arm (and sometimes her hand) ever since. Pain has limited her cervical range of motion.
3. _____ began seeing an orthopedist and underwent more than two months of physical therapy, as well as several epidural steroid injections, but obtained little relief.
4. An MRI of the cervical spine showed a 2-millimeter central disc protrusion at C5-6 mildly flattening the thecal sac and abutting the cord surface, but not compressing the cord. Kevin Gill, M.D., an orthopedic surgeon, interpreted _____'s MRI of the cervical spine to show a high-intensity zone lesion at the C5-6 level.
5. Dr. Gill requested pre-authorization for a CT discogram several times.

⁶ The IRO report says, Records indicate that she has had a MRI of the cervical spine. . . Petitioner Exhibit 1 at 1.

6. American Home Assurance Company, the workers' compensation insurance carrier (Carrier), denied the requests because Carrier determined the procedure was not reasonable and necessary.
7. Dr. Gill is a graduate of the Baylor College of Medicine in Houston and has been board-certified in orthopedic surgery since 1988.
8. Dr. Gill believes that ___ may have internal disc disruption. Dr. Gill has identified three possible courses of action for _____ at this point: (1) continued conservative care; (2) cervical arthroplasty; or (3) an interior cervical fusion procedure.
9. Dr. Gill believes that _____'s unrelenting pain and the high intensity zone lesion shown on the MRI would, if the provocative discogram were positive at the C5-6 level (and not at the other nearby levels), constitute sufficient evidence of a painful annular tear at that level to justify surgery.
10. A hearing was conducted July 14, 2004, and the record closed the same day.
11. _____ appeared on her own behalf, assisted by Barton Levy, Ombudsman with the Commission. Attorney Steven Tipton appeared on behalf of Carrier.
12. All 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.
13. A 3-level cervical discogram with CT scan is reasonable and necessary to treat _____'s compensable injury.

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.
2. All parties received proper and timely notice of the hearing. TEX. GOV ' T CODE ANN. ' ' 2001.051 and 2001.052.
3. _____ has the burden of proof. 28 TEX. ADMIN. CODE ' ' 133.308(w), 148.21(h)-(i).

4. Carrier should pre-authorize the requested cervical discogram with CT scan, which is reasonable and necessary medical treatment for _____'s injury. TEX. LABOR CODE ANN. §§ 401.011(19) and 408.021.

ORDER

IT IS, THEREFORE, ORDERED that pre-authorization be granted for a cervical discogram with CT scan, as requested by Dr. Kevin Gill.

SIGNED August 5, 2004.

**SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**