

**SOAH DOCKET NO. 453-04-6492.M2
TWCC NO. M2-04-1210-01**

AMERICAN HOME ASSURANCE CO., : **BEFORE THE STATE OFFICE**
Petitioner :
V. : **OF**
JOHANN VAN BEEST, D.C., :
Respondent : **ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Johann Van Beest, D.C., (Provider) challenged the decision of American Home Assurance Co. (Carrier), denying preauthorization for a lumbar discogram with CT scan (discogram). The dispute was referred to an Independent Review Organization (IRO), which authorized the procedure. In this decision, the Administrative Law Judge (ALJ) finds that Carrier proved by a preponderance of the evidence that the requested discogram should not have been preauthorization.

The hearing convened and closed on July 14, 2004, before ALJ Steven M. Rivas. Carrier appeared and was represented by Dan Kelley, attorney. Provider appeared and represented himself.

I. DISCUSSION

1. Background Facts

Claimant sustained a compensable back injury on _____. Claimant underwent years of physical therapy and diagnostic testing as part of her treatment. Provider initially requested preauthorization for the discogram on March 9, 2004, and was twice denied. The dispute was referred to an IRO, which held the requested discogram was medically necessary in its report dated May 26, 2004. On May 27, 2004, Carrier appealed the IRO decision to the State Office of Administrative Hearings (SOAH). On June 15, 2004, before the SOAH hearing, Provider administered the discogram in question.

2. Applicable Law

Pursuant to the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ' 408.021 *et seq.*, an employee who sustains a compensable injury is entitled to all health care 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.

Under TEX. LAB. CODE ANN. ' 401.011(19), health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.

Certain categories of health care identified by the Commission require preauthorization, which is dependant upon a prospective showing of medical necessity under ' 413.014 of the Act and 28 TEX. ADMIN. CODE (TAC) ' 134.600. In this instance under the Commission's rules at 28 TAC ' 134.600(h)(7), preauthorization is required for the discogram requested by Claimant.

3. Evidence and Analysis

Carrier offered sufficient evidence to support the discogram should not have been administered. Based on the record, Claimant's first treating doctor, Robert Grant, D.C., administered an MRI examination to Claimant on December 17, 2001, which revealed a congenital anomaly@ in her spine at the L5/S1 level. Claimant's anomaly was that her spine had not fully developed in the L5/S1 region. According to Carrier's expert, Melissa Tonn, M.D., Claimant's under-developed spine would not explain why Claimant was experiencing discomfort in her back and legs.

Claimant's month-long treatment with Dr. Grant provided no significant change in her condition, and she was subsequently referred to Stuart Small, M.D., for a series of epidural steroid injections (ESI).¹ Dr. Small noted the injections provided good improvement for Claimant.

¹ The record indicates Dr. Grant monitored and reported Claimant's progress while she was treated by other

Additionally, Dr. Small noted Claimant's pain was less, and that she had greater mobility. Despite the results from Claimant's ESIs, Claimant continued to complain of low back pain, and was subsequently referred to Robert Myles, M.D., for a surgical consultation.

Dr. Myles examined Claimant on February 19, 2002, and recommended Claimant undergo an EMG/nerve conduction study. According to Dr. Tonn, the results of the EMG test revealed questionable evidence@ of radiculopathy. Following the EMG test, Claimant underwent a required medical evaluation (RME) by Benzel C. Macmaster, M.D., on April 2, 2002. Dr. Macmaster examined Claimant and noted there was no specific evidence to suggest the patient suffered a herniated disc,@ or any other injury to her lumbar spine. Dr. Macmaster strongly recommended Claimant undergo a functional capacity evaluation (FCE) followed by a physical therapy program, which he believed should prepare her to return to work within six weeks. Dr. Macmaster additionally asserted that no surgical consultation was necessary at that time.

On May 21, 2002, Dr. Myles saw Claimant again and reported that her symptoms were Aa bit confusing. Regardless, Dr. Myles recommended Claimant undergo a lumbar discogram to help in determining a proper diagnosis. The discogram was denied. On May 29, 2002, Claimant underwent an FCE. Based on her performance, the therapist who administered the FCE recommended Claimant undergo further diagnostic tests and possibly consider surgery as an alternative, if necessary.

On July 3, 2002, Claimant underwent a lumbar discogram. Dr. Tonn noted the report of the discogram was contained in the record, but an interpretation of the results was missing. Based on her review of the results, Dr. Tonn testified the discogram did not establish that Claimant was a surgical candidate. Dr. Tonn additionally pointed to a report from Dr. Myles following the discogram where he remarked, all of this is extremely confusing. Dr. Tonn admitted the discogram revealed that Claimant exhibited some discomfort in her spine at the L4/L5 and L5/S1 regions, but that it did not warrant surgical intervention.

providers. However, the record reflects Dr. Grant did not provide any further services to Claimant, other than office visit consultations.

On July 23, 2002, Stanley J. Bigos, M.D., performed a peer review on Claimant's condition. Based on his review of the record, Dr. Bigos concluded that the available data was unreliable to justify either fusion or IDET based on diagnostic discography.[@] Nevertheless, Dr. Myles recommended on two occasions that Claimant undergo a fusion operation. Both recommendations were denied by Carrier. Dr. Tonn testified the reviewers all but noted Claimant does not have clear evidence of a correctable condition, and that Dr. Myles had not established that Claimant had any spinal instability that could be corrected through surgery.

Dr. Tonn testified that in October 2003, Claimant inexplicably changed treating doctors from Dr. Myles to Provider, who recommended further diagnostic tests. Dr. Tonn testified that a lumbar myelogram performed on November 19, 2003, did not reveal any correctable pathology.

Provider referred Claimant to Jacob Rosenstein, M.D., who diagnosed Claimant with facet syndrome and recommended facet injections. The injections offered some relief to Claimant, but Claimant continued to complain of back pain. Provider then requested a repeat discogram, which was denied by Carrier.

Dr. Tonn testified that a discogram procedure is one that is performed prior to surgery, and Claimant had repeatedly exhibited she was not a candidate for surgical intervention. Provider argued the prior discogram was incorrectly administered to Claimant. However, Provider offered insufficient evidence to support this claim.

Provider questioned Dr. Tonn about her knowledge of articles published in the North American Spine Society (NASS) regarding the effectiveness of the discogram procedure. An article from NASS was admitted at the hearing. The article outlined several benefits to performing a discogram, however, Provider did not sufficiently explain the relevance of this position. This was an important issue considering Claimant had already undergone a discogram, which essentially showed Claimant was not a surgical candidate.

The ALJ found Dr. Tonn's testimony more persuasive in that there was no reason to perform a repeat discogram after it had been sufficiently established that Claimant had no spinal instability

and thus there was no basis that Claimant needed a fusion operation.

II. FINDINGS OF FACT

1. Claimant sustained a compensable back injury on ____.
2. On March 9, 2004, Johann Van Beest, D.C. (Provider), requested Claimant undergo a lumbar discogram with CT scan (discogram), which was denied by American Home Assurance Company (Carrier) as not medically necessary.
3. Provider sought medical dispute resolution with the Texas Workers' Compensation Commission's Medical Review Division, which referred this matter to an Independent Review Organization (IRO). The IRO disagreed with Carrier and held the requested discogram was medically necessary in its report dated May 26, 2004.
4. Carrier timely requested a hearing before the State Office of Administrative Hearings (SOAH) on May 27, 2004.
5. Notice of the hearing in this case was mailed to the parties on June 17, 2004. The notice 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.
6. The hearing convened and closed on July 14, 2004, before Steven M. Rivas, Administrative Law Judge (ALJ). Carrier appeared and was represented by Dan Kelley, attorney. Provider appeared and represented himself. The hearing was adjourned and the record closed the same day.
7. A discogram is performed in anticipation of surgery.
8. Claimant had a prior discogram on July 3, 2002, which revealed Claimant had discomfort in her spine at the L4/L5 and L5/S1 regions, but did not establish that she was a surgical candidate.
9. Claimant underwent several diagnostic tests before and after her first discogram, which established that Claimant was not a candidate for surgical intervention.
10. Provider administered the requested discogram on June 15, 2004.

III. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over 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. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. ' ' 2001.051 and 2001.052.
3. The Carrier, as Petitioner, had the burden of proof on appeal by a preponderance of the evidence under ' 413.031 of the Act, and 28 TEX. ADMIN. CODE ' 148.21(h).
4. The requested discogram was not medically necessary to treat Claimant's compensable injury because Claimant was not a candidate for surgical intervention.

ORDER

IT IS, THEREFORE, ORDERED that the Provider receive no reimbursement for the requested lumbar discogram.

SIGNED SEPTEMBER 8, 2004.

**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**