

**SOAH DOCKET NO. 453-04-8229.M2  
TWCC NO. M2-04-1435-01**

—, **BEFORE THE STATE OFFICE**  
**Petitioner** **OF**  
  
v. **ADMINISTRATIVE HEARINGS**  
**ZURICH AMERICAN INSURANCE COMPANY,**  
**Respondent** **DECISION AND ORDER**

After an Independent Review Organization (IRO) denied preauthorization for a lumbar spinal MRI, Claimant appealed. This decision finds that Claimant's physician has not documented his reasons for requesting a second lumbar spinal MRI and that Claimant did not prove that the MRI he seeks is medically necessary. Preauthorization is denied.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

There were no contested issues of jurisdiction, notice, or venue. Therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened September 13, 2004, at the State Office of Administrative Hearings (SOAH), 300 W. 15<sup>th</sup> Street, Austin, Texas, with Administrative Law Judge (ALJ) Charles Homer III presiding. The record was closed that date. Claimant appeared by telephone and was assisted by Juan Mireles, ombudsman. Zurich American Insurance Company (Respondent) was represented by counsel, Steven M. Tipton.

## **II. APPLICABLE LAW**

The only issue in this case is whether, by a preponderance of the evidence, the requested treatment is medically necessary. Medical necessity is determined by reference to TEX. LAB. CODE ANN. § 408.021(a), which states:

- (a) 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.

Under 28 TAC § 148.21(h), the appealing party has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LAB. CODE ANN. § 413.031. Thus, Claimant, as the petitioner, must prove the requested treatment is reasonably required within the meaning of TEX. LAB. CODE ANN. § 408.021(a).

## **III. THE PARTIES' EVIDENCE AND POSITIONS**

### **A. Claimant's Injury and Treatment**

On \_\_\_, Claimant, who was born in 1937, sustained a back injury compensable under the Texas Workers' Compensation Act. While pulling a heavy object with a chain, he fell backwards onto his side and back. His immediately observable injuries were contusions to his back and right forearm, and pain in his middle back.<sup>1</sup> A July 7 exam by another physician found only contusions

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<sup>1</sup> Res. Exh. 1, p. 1.

and diagnosed cervical and left shoulder strain. Ten days later, he was seen again and diagnosed with lumbar and cervical strain.<sup>2</sup> Since that time, Claimant has undergone a cervical discectomy and fusion of cervical vertebrae, multiple courses of epidural steroid injections, cervical and lumbar spinal MRIs, CT scans, and myelograms. Current treatment is palliative, including pain medication and antidepressants. From almost the beginning of his treatment, he has been diagnosed with degenerative arthritic spinal disease.<sup>3</sup> At some time before his compensable injury, Claimant had surgery on his lumbar spine, including a laminectomy at L4-5.<sup>4</sup>

Provider Robert D. Bernauer, M.D., the Louisiana orthopedic surgeon who performed the cervical spine surgery, requested an MRI.<sup>5</sup> He has also recommended two separate surgeries, posterior cervical decompression of the neck and lumbar fusion at L2-3 and L3-4.<sup>6</sup>

## 2. Evidence

Claimant testified that he was injured on the job, and that Dr. Bernauer has performed surgery on his neck. He stated that Dr. Bernauer now wants to do surgery on his back and neck, but that Dr. Bernauer will not perform surgery without a current MRI. Claimant stated that Dr. Bernauer wants to operate on his neck before the lumbar surgery, and that he is willing to undergo both surgeries if Dr. Bernauer will perform them. Claimant testified that he has been through a chronic pain management program and that his current medications are hydrocodone, Vioxx, and diazepam.

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<sup>2</sup> *Id.*

<sup>3</sup> Res. Exh. 1, pp. 1-18.

<sup>4</sup> Pet. Exh. 1, p. 32.

<sup>5</sup> Res. Exh. 1, p. 8.

<sup>6</sup> *Id.*, p. 18; Pet. Exh. 1, p. 18.

Each party offered documents concerning prior treatment and Dr. Bernauer's request and recommendations.

### 3. Parties' Positions

Claimant argues that the most recent lumbar spinal MRI is four years old,<sup>7</sup> and that a current MRI is necessary for Dr. Bernauer, who has treated Claimant since 1998,<sup>8</sup> to proceed with Claimant's treatment.

Carrier cites Dr. Bernauer's statement that spinal surgery is needed at two separate but well-identified levels and questions what Dr. Bernauer would gain from another MRI. Carrier further questions the present need for a lumbar MRI when Dr. Bernauer is going to operate first on Claimant's cervical spine. Carrier also argues that Dr. Bernauer has declined to follow spine treatment protocols for workers' compensation patients by failing to document the reason he is requesting an MRI.

## IV. ANALYSIS

The requested MRI is not medically necessary. Dr. Bernauer's failure as Claimant's healthcare provider to document his reasons for the request leaves the ALJ very little from which to conclude otherwise. His failure is decisive because in this case it is difficult to understand how any of Claimant's post-accident medical history was medically necessary for his injuries. The record is clear is that he has arthritic changes in his spine<sup>9</sup>, but nothing in the record before the ALJ draws a

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<sup>7</sup> *Id.*, at p. 32.

<sup>8</sup> *Id.*, at p. 5.

<sup>9</sup> Pet. Exh. 1, pp. 26-27 is a 2002 report of a cervical myelogram. The only abnormal findings are Avery minimal denervations@ of Claimant=s upper arms and shoulders on both sides. The reporter states that A[V]ery mild C6 and C7 root irritation bilaterally is likely and possibly secondary to previous laminectomies.@

connection between Claimant's 1997 bruises and strains and either the prior surgery or the operations that Dr. Bernauer states are needed. Without evidence that the recommended surgeries will cure or

relieve the effects naturally resulting from Claimant's compensable injury, promote his recovery, or enhance his ability to return to or retain employment, the ALJ cannot say that the MRI required for one of those surgeries is medically necessary. Therefore, Provider should not be granted preauthorization for the requested MRI.

## **V. FINDINGS OF FACT**

1. On August 10, 2004, the Texas Workers' Compensation Commission (Commission) sent notice of the hearing to be held on September 13, 2004, to all parties.
2. The notices 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.
3. Claimant suffered a compensable work-related injury on \_\_\_, when he fell on his back and right side while he was using a chain to pull a heavy object.
4. On that same date Zurich American Insurance Company (Carrier) was the workers' compensation insurance carrier for Claimant's employer.
5. Claimant initially reported pain in his middle back, and had contusions on his back and arm.
6. One week later, in July 1997, Claimant saw a different physician who diagnosed him with strains of his cervical spine and left shoulder.
7. Claimant's X-rays show no likely sources of his pain except degenerative arthritic changes in his spine and previous spinal surgeries.
8. Since his injury, Claimant has undergone a cervical discectomy and fusion of cervical vertebrae, multiple courses of epidural steroid injections, cervical and lumbar spinal MRIs, CT scans, and myelograms.
9. Claimant's current treatment is palliative, including pain medication and antidepressants.
10. Robert D. Bernauer, M.D. (Provider), sought preauthorization of a repeat MRI of Claimant's lumbar spine.

11. Carrier denied preauthorization for the MRI on the basis that the treatments were not reasonable or medically necessary.
12. After Provider filed a request with the Commission's Medical Review Division (MRD) for medical dispute resolution, the MRD referred the matter to an Independent Review Organization (IRO).
13. The IRO recommended denial of reimbursement on July 8, 2004, on the basis that the disputed treatment and services were not medically necessary.
14. On July 16, 2004, Claimant filed a request for a hearing before SOAH to contest the MRD decision.

## **VI. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. ' 413.031.
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. ' 413.031(k) and TEX. GOV'T CODE ANN. Chapter 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN., Chapter 2001 and SOAH's rules, 1 TEX. ADMIN. CODE (TAC) Chapter 155.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. ' 2001.052.
5. The MRI of Claimant's lumbar spine requested by Provider is not medically necessary within the meaning of TEX. LAB. CODE ANN. ' 408.021(a).
6. Based on the foregoing Findings of Fact and Conclusions of Law, no preauthorization should be ordered.

## **ORDER**

**IT IS, THEREFORE, ORDERED** that Provider's request for preauthorization of an MRI of Claimant's lumbar spine is denied.

**SIGNED October 20, 2004.**

**CHARLES HOMER III  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**