DOCKET NO. 453-05-4142.M2
TWCC MDR NO. M2-05-0434-01

AMERICAN HOME ASSURANCE COMPANY	§	**BEFORE THE STATE OFFICE**
PETITIONER	§	
V.	§	
	§	**OF**
MICHAEL PECK, D.C.	§	
RESPONDENT	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

American Home Assurance Company (Carrier) appealed the decision of the Texas Workers' Compensation Commission (Commission) designee, an Independent Review Organization (IRO), which granted preauthorization for a discogram. In this case, Carrier failed to prove that the discogram was not medically necessary. The Administrative Law Judge (ALJ) finds that the discogram is medically necessary and should be preauthorized.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On March 17, 2005, ALJ Michael J. O'Malley convened the hearing on the merits at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Carrier appeared through its attorney, W. David Floyd. Michael Peck, D.C. (Provider) appeared through his attorney, William G. Pulkingham. After the evidence was presented, the record of the hearing closed on March 31, 2005, after the parties filed post-hearing closing arguments.

II. BACKGROUND, EVIDENCE, AND DISCUSSION

1. Background

On ___, Claimant ___ (Claimant) sustained a compensable low back injury while working for ___ in Huntsville, Texas. Claimant was moving empty wooden pallets and felt a sudden, sharp pain in her lower back. Provider began treating Claimant on August 6, 2003, and became her treating doctor. Initially, Provider treated Claimant with conservative therapy, and she attempted to return to work performing light duties. Her return to work failed, and she had to eventually quit working altogether. Provider referred Claimant to Steven Sims, M.D., for pain management. She underwent three epidural injections, which did not resolve her pain. Christian Fras, M.D., an orthopedic spine surgeon, evaluated Claimant on November 24, 2003, and determined that she should pursue an aggressive course of non-operative physical therapy and anti-inflammatory medicines. If conservative treatment did not prove to be effective, Dr. Fras stated that surgical

intervention should be considered. Provider has treated Claimant since her injury ___ months ago, and her treatment plan has included chiropractic care, physical therapy, injections, and a chronic pain
management program. Claimant, however, remains symptomatic in the lower back area and has not been able to return to work.

1. Legal Standards

Carrier has the burden of proof in this proceeding. 28 TEX. ADMIN CODE (TAC) § 148.21(h). An employee who has sustained 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 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. TEX. LABOR CODE ANN. § 408.021(a). For a carrier to be liable to reimburse a provider, certain services, including discogram, must be preauthorized by the carrier. 28 TAC § 134.600(h)(7).

2. Parties' Positions and Evidence

1. Carrier's Position and Evidence

After submitting documents in evidence, Melissa Tonn, M.D., testified on behalf of Carrier. She testified that a discogram is a tool typically used for surgical planning, such as when a patient is a likely candidate for a spinal fusion. She further stated that a discogram is controversial because of the risk associated with this procedure. For example, she testified that a discogram could further injure the disc or could expand any herniation. Dr. Tonn also testified that her research on Claimant indicated no spinal instability or clear signs of radiculopathy. She concluded her testimony by stating that there did not appear to be any correctable pathology justifying a discogram or spinal fusion.

Carrier argues that, according to G. Peter Foox, M.D., Claimant has reached maximum medical improvement and that there would be no benefit from an invasive procedure such as a discogram. Carrier also relies on a earlier IRO decision, which found that the discogram was not medially necessary because Claimant's pain resulted from a sprain/strain and not the type of neurological deficit warranting a discogram and its related procedures.

2. Provider's Position and Evidence

After submitting its documents in evidence, Provider briefly testified. In general, he testified that Claimant has attempted various treatments since her injury, but she still has pain and cannot return to work. Provider referred the ALJ to his October 6, 2004 letter to the Texas Workers' Compensation Commission, which explained his reasons for the necessity of the discogram. In that letter, Provider explained that he had been unable to get approval from the Carrier for the necessary diagnostic tests to determine the best course of action for Claimant. He reported that Claimant has become more emotionally stable since her chronic pain program and test results are more accurate,

allowing him to determine her symptomology. He further stated in the letter that Claimant continues

to have debilitating pain in the lumbar region that extends down her left leg. He indicated that a lumbar discogram will help determine the actual pain generator and, with this information, he can move forward with a treatment plan to improve her condition.[1]

Provider notes that several other doctors have recommended the discogram for Claimant. He argues that the specialists who have seen Claimant recommend the discogram. On the other hand, he claims that the doctors relied on by Carrier, for the most part, are doctors that have not examined Claimant and have not reviewed the results of the lumbar MRI and the lower extremity EMG/NCV test. Provider further asserts that Dr. Tonn, Carrier's witness, never examined Claimant and has a bias against discograms as a diagnostic tool.

3. ALJ's Analysis

The ALJ finds Carrier did not prove by a preponderance of evidence that the discogram is not medically necessary for Claimant. Claimant presents a complicated case and one that is difficult to assess without the proper diagnostic test. The evidence shows that Provider and other doctors have been treating Claimant for 19 months, including chiropractic care, physical therapy, injections, and a chronic pain management program, but she still has debilitating pain and is unable to return to work. Provider must determine the best course of treatment to return Claimant back to work, and the discogram will provide the necessary information for him to make that determination. For the reasons discussed below, the ALJ finds that the Carrier failed to meet its burden of proof in this case.

The ALJ was not persuaded by Dr. Tonn's testimony at the hearing. She had examined some records of the Claimant, but it was clear that she had not reviewed all of the records or examined Claimant. More importantly, Dr. Tonn's testimony exhibited a clear bias against discograms. She testified that in her 15 years of practice, she has referred one patient for a discogram. Furthermore, according to Dr. Tonn, a discogram should only be used if a patient has spinal instability, requiring a spinal fusion. Even with spinal instability, Dr. Tonn would not necessarily recommend a discogram.

Dr. Tonn's opinion regarding Claimant, however, was contradicted by various doctors who examined Claimant and were in a better position to determine whether Claimant needed a discogram. Provider, who has treated Claimant for 19 months, recommends a discogram for her. His recommendation was confirmed by various doctors as discussed below, which the ALJ found to be persuasive.David Strausser, M.D., an orthopedic surgeon, examined Claimant in September 2004 and recommended a discogram to determine the location of the Claimant's pain generator in her lower back. Dr. Strausser concluded that if Claimant's discogram was positive for discogenic pain at the L5-S1 level, then Claimant should consider an IDET or nucleoplasty. He also stated that a spinal fusion may be necessary if all else failed. In addition to examining Claimant, Dr. Strausser reviewed the lumbar MRI report dated August 22, 2003.[2] The MRI showed moderately advanced loss of disc

[1] Provider Ex. 1 at 64-66.

[2] Provider Ex. 1 at 11-14.

signal and mild loss of disc height at the L5-S1 level, small osteophytes, and an underlying 2-3 mm broad-based disc bulge.[3]

Steven Sims, M.D., a pain management specialist, treated Claimant on February 2, 2004 for a pain management follow-up. He noted Claimant has three epidural steroid injections with minimal improvement. He concluded that Claimant had persistent discogenic low back pain. At that time, he recommended a lumbar discogram and, if he results were positive, Claimant should consider percutaneous diskectomy. Dr. Sims performed left-sided lumbar facet joint injections from L2 to S1 on March 15, 2004, and Claimant did not improve. Dr. Sims saw Claimant again on October 13, 2004, but informed her that her treatment was on hold until the discogram dispute was resolved.[4]

On April 21, 2004, Christian Fras, M.D., and orthopedic spine surgeon, saw Claimant and recommended a lumbar discogram to determine the need for lumbar spine surgery. Dr. Fras saw Claimant again on July 2, 2004, and stated that he would not consider surgery until a discogram had been performed.[5]

On November 29, 2004, Sherif Ramzy, M.D., a neurologist, examined Claimant and interpreted the results of her EMG/nerve conduction study. She concluded that the study suggested mild S1 radiculopathy.[6]In this case, several doctors have examined Claimant and recommended a discogram to determine the exact source of her pain. As the doctors indicated, the discogram will also determine if Claimant needs spinal surgery. At a minimum, the discogram will identify the discs causing the pain. Finally, if the results of the discogram indicate that surgery is necessary, Carrier will have the opportunity to dispute the medical necessity of the surgery.[7] For these reasons, the ALJ finds that the discogram for Claimant is medically necessary and should be preauthorized.

III. FINDINGS OF FACT

1. On ___, Claimant ___ (Claimant) sustained a compensable work-related injury while working for ___ in Huntsville, Texas.

2. Claimant's injury occurred when she was moving empty wooden pallets and felt a sudden, sharp pain in her lower back.

3. At the time of the compensable injury, ___ had workers' compensation insurance through American Home Assurance Company (Carrier).

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[3] Provider Ex. 1 at 7.

[4] Provider Ex. 1 at 118-123.

[5] Provider Ex. 1 at 125-126.

[6] Provider Ex. 1 at 8-10.

[7] Spinal surgery requires preauthorization.

4. Michael Peck, D.C. (Provider) became Claimant's treating doctor.

5. Provider initially treated Claimant with conservative therapy.

6. Claimant attempted to return to work performing light duties without success.

7. Provider has treated Claimant for 19 months, and her treatment plan has included chiropractic care, physical therapy, injections, and a chronic pain program.

8. Claimant continues to have debilitating pain in her lumbar region that extends down her left leg.

9. David Strausser, M.D., an orthopedic surgeon, examined Claimant in September 2004 and recommended a discogram to determine the location of the Claimant's pain generator in her lower back.

10. Dr. Strausser concluded that if Claimant's discogram was positive for discogenic pain at the L5-S1 level, then Claimant should consider an IDET or nucleoplasty. He also stated that a spinal fusion may be necessary if all else failed.

11. Dr. Strausser reviewed the lumbar MRI report dated August 22, 2003.

12. The MRI showed moderately advanced loss of disc signal and mild loss of disc height at the L5-S1 level, small osteophytes, and an underlying 2-3 mm broad-based disc bulge.

13. Steven Sims, M.D., a pain management specialist, treated Claimant on February 2, 2004 for a pain management follow-up.

14. Claimant had three epidural steroid injections with minimal improvement.

15. Dr. Sims concluded that Claimant had persistent discogenic low back pain.

16. Dr. Sims recommended a lumbar discogram and, if he results were positive, Claimant should consider percutaneous diskectomy.

17. Dr. Sims also performed left-sided lumbar facet joint injections from L2 to S1 on March 15, 2004, and Claimant did not improve.

18. Dr. Sims saw Claimant on October 13, 2004, but informed her that her treatment was on hold until the discogram dispute was resolved.

19. On April 21, 2004, Christian Fras, M.D., and orthopedic spine surgeon, saw Claimant and recommended a lumbar discogram to determine the need for lumbar spine surgery.

20. Dr. Fras saw Claimant again on July 2, 2004, and stated that he would not consider surgery until a discogram had been performed.

21. On November 29, 2004, Sherif Ramzy, M.D., a neurologist, examined Claimant and interpreted the results of her EMG/nerve conduction study.

22. Dr. Ramzy concluded that the EMG/nerve conduction study suggested mild S1 radiculopathy.

23. The discogram will determine whether Claimant needs spinal surgery and, at a minimum will identify the discs causing the pain.

24. The discogram for Claimant is medically necessary and is a legitimate diagnostic tool to determine whether surgery, such as a spinal fusion, is necessary for Claimant.

25. Carrier denied preauthorization for the discogram as not medically necessary.

26. On December 28, 2004, an Independent Review Organization (IRO) granted Provider preauthorization for the discogram.

27. On January 26, 2005, Carrier appealed the IRO's decision.

28. The Texas Workers' Compensation Commission (Commission) sent notice of the hearing to the parties on February 15, 2005. The hearing notice informed the parties of the matter to be determined, the right to appear and be represented, the time and place of the hearing, and the statutes and rules involved.

29. The hearing was held on March 17, 2005. Carrier appeared through its attorney, W. David Floyd. Provider appeared through his attorney, William G. Pulkingham.

30. The record in this proceeding closed on March 31, 2005, after the parties filed post-hearing closing arguments.

31. The only contested issue involved the medical necessity of the three-level lumbar discogram and post-discogram computer tomography.

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 TEX. LAB. CODE ANN. §§ 402.073 and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.

2. Proper and timely notice of the hearing was provided to the parties in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

3. An employee who has sustained 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 cures or relives the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).

4. Pursuant to 28 TEX. ADMIN. CODE § 148.21(h), Carrier has the burden of proving by a preponderance of the evidence that the discogram is not medically necessary.

5. Carrier did not prove by a preponderance of the evidence that the discogram is not medically necessary for Claimant.

6. A discogram requires preauthorization. TEX. LAB. CODE ANN. § 413.014(a); 28 TEX. ADMIN. CODE § 134.600(h)(7).

7. Based on the Findings of Fact and Conclusions of Law, the discogram should be preauthorized.

ORDER

IT IS HEREBY ORDERED that Claimant ___ is entitled to preauthorization for the three-level lumbar discogram and (post-discogram computer tomography).

SIGNED April 20, 2005.

MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING