

STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Suite 502
Austin, Texas 78701

SOAH DOCKET NO. 453-03-0701.M2
[MDR TRACKING NO. M2-02-0732-01]

TEXAS MUTUAL INSURANCE	§	BEFORE THE STATE OFFICE
COMPANY,	§	
<i>Petitioner</i>	§	
V.	§	OF
	§	
TEXAS WORKERS' COMPENSATION	§	
COMMISSION and S. ALI	§	
MOHAMED, M.D.	§	
<i>Respondents</i>	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. SUMMARY

This case is an appeal by Texas Mutual Insurance Company (Petitioner) from the decision issued by the Texas Medical Foundation's independent review organization (IRO), pursuant to the Texas Workers' Compensation Commission (Commission) rules. The IRO had determined that the requested procedure, lumbar discogram with post CT scan, was medically necessary, and had ordered Petitioner to pay the reasonable and necessary costs of this medical service.

On November 19, 2002, Administrative Law Judge (ALJ) Lilo D. Pomerleau convened a hearing on this matter. The hearing was concluded and the record closed that date. Petitioner appeared and was represented by Patricia Eads and Respondent S. Ali Mohamed, M.D., appeared via telephone on his own behalf. The Commission is not a party to this proceeding.

This decision finds, based on the record in this case, that the lumbar discogram is medically reasonable and necessary and should be preauthorized.

II. DISCUSSION

A. Background and Parties' Argument

Claimant _____ suffered a work-related injury on _____, while lifting a heavy metal beam. On November 10, 2000, X-rays of the thoracic spine were unremarkable. Subsequently, on January 12, 2001, an MRI was performed on Claimant's lumbar, sacral, and cervical spine. The patient has chronic low back pain without radicular symptoms and has not responded to conservative treatment.¹ On March 11, 2002, Claimant's treating physician requested preauthorization for a lumbar discogram with post CT scan at levels L2-L3; L3-L4; L4-L5; and L5-S-1. The Carrier

¹Petitioner Ex. A at 1.

(Petitioner in this matter) denied the request. Petitioner timely appealed, and the IRO found the requested procedure to be medically necessary.²

At the hearing, Petitioner presented the testimony of Dr. N.F. Tsourmas, a board-certified orthopaedic surgeon and Medical Director/Medical Consultant for Texas Mutual Insurance Company, Petitioner. Dr. Tsourmas testified that he has reviewed Claimant's medical history (although he has not personally examined Claimant) and concluded that a discogram would not benefit the Claimant from a diagnostic point of view. In his opinion, a discogram is a poor diagnostic maneuver in general; in this particular case, the procedure provides all risk and no benefit because Claimant has degenerative disk disease and diffuse pain. According to Dr. Tsourmas, a discogram is not normally performed on the requested four levels (L2-L3; L3-L4; L4-L5; and L5-S1); he suggested that it is more common to perform the procedure on a problem area and one control area, which allows a doctor to isolate the problem. Dr. Tsourmas also testified that he would not perform a discogram on his own patients, in order to eliminate any subjectivity from the testing.

Petitioner also presented the testimony of Dr. Robert W. Joyner, specializing in Pain Management and Anesthesiology. Dr. Joyner, who also reviewed Claimant's medical files but has not personally examined him, concurred with Dr. Tsourmas' conclusion that a discogram is unlikely to benefit Claimant's treatment or diagnosis. He also agreed that the attendant risks from the procedure itself (infection, bleeding, and pain) could harm Claimant. However, he contradicted Dr. Tsourmas' testimony that a discogram is not normally performed on four levels (as requested here); he also stated that he performs his own discograms, approximately four to six per month. In response to cross-examination, Dr. Joyner stated that Claimant's only prognosis is pain management through medication and home exercise. He testified that a discogram would have been beneficial earlier, but not now, after two years of injections and treatments performed to date. He concluded that a discogram will not help Dr. Mohamed's future treatment and diagnosis of Claimant's pain.

Petitioner also submitted medical reports from Jeffrey D. Reuben, M.D., Ph.D., P.A.; Dhiren Patel, D.O.; and Brian C. Buck, M.D. The former conducted a physical examination of Claimant on March 13, 2001, concluding that:

²Petitioner Ex. A at 2.

[J.E.] has a lumbosacral strain and disc bulging. he also has right knee patellar chondromalacia and patellar tendinitis. I recommend that he rest, apply hot and cold compresses and undergo a course of physical therapy.³

Dr. Patel physically examined and evaluated Claimant on July 20, 2001, finding the patient reached MMI as of that date, with a whole person impairment of 16 %.⁴

Dr. Buck did not personally examine Claimant; rather he reviewed medical information forwarded to him by the Carrier; he observed, by report dated October 12, 2001, that Claimant's treatment appeared "excessive" and was for "pathology not related to the compensable injury alone."⁵

Respondent Dr. Mohamed also testified at the hearing. Dr. Mohamed did a residency in surgery and anesthesiology; additionally, he completed a pain management fellowship at Harvard Medical School. His current practice concentrates on pain management exclusively; he does not practice anesthesiology. He studies and treats primarily spine injuries, as well as some nerve-related problems.

Dr. Mohamed testified he has followed the Commission's Spinal Treatment Guideline (Guideline) in treating Claimant through a process of rehabilitation and with medicine; then one step further, with epidural steroid injections in order to treat Claimant's radicular pain. To demonstrate why he recommended a discogram for Claimant, Dr. Mohamed explained how the spine and the nervous system works: the nerves travel from the brain, going left or right to each "local address" along the spine, until reaching the lower spine where the nerves become thin and eventually taper off. Pain can occur when a spinal disc bulges and press on the nearby nerve ending, causing radicular pain, or pain can also come from a broken disc nucleus, which chemically irritates the adjacent nerve. According to Dr. Mohamed, a discogram can determine whether the pain is caused by pressure (bulging) or by chemicals.

Dr. Mohamed agreed that Claimant shows some sign of degenerative changes, which is to be expected as Claimant has performed manual labor for a number of years. He wants to perform the requested procedure on Claimant's three bulging disks in order to determine if the pain is on all levels (in which case further treatment will likely be limited to medication) or if the pain is confined to one or two levels. In the latter scenario, he would opt to do a percutaneous procedure or Dr. Mohamed would refer him to a surgeon for a possible fusion. (He also indicated that results from the discogram could assist in any subsequent percutaneous procedure.)

Dr. Mohamed strongly asserted he would not recommend a discogram if he did not think it

³Petitioner Ex. F at 2.

⁴Petitioner Ex. G at 3.

⁵Petitioner Ex. H at 4.

would help his patient.

B. Analysis

The proposed discogram with CT scan is reasonably required, consistent with the Guideline, and should be preauthorized, as initially determined by the IRO.

1. Applicable Law

Workers' compensation insurance covers all medically necessary health care, which includes all reasonable and necessary medical aid, examinations, treatments, diagnoses, evaluations and services.⁶ Section 408.021 of the Act provides:

- (1) 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.

Section 401.011(19) of the Act defines "health care" to include "all reasonable and necessary medical ... services."

Certain health care treatments require preauthorization. Preauthorization is dependent upon a prospective showing of medical necessity for the recommended treatment or service. TEX. LAB. CODE ANN. § 413.014 (Vernon 1996), 28 TEX. ADMIN. CODE (TAC) § 134.600(a) and (d). The Guideline clarifies those services that are reasonable and medically necessary for operative and nonoperative care to the spine and identifies a normal course of treatment. 28 TAC § 134.1001(b) Discography with a CT scan is a recognized diagnostic intervention in the Guideline. 28 TAC § 134.1001(f)(2)(J). A non-emergency discogram requires preauthorization. 28 TAC § 134.600(h)(5). The Guideline lists four indicators for discogram, including "unremitting lower back pain resistant to conservative care for more than six months." 28 TAC §134.1001(f)(3)(D).

Texas Mutual Insurance Company, as Petitioner, bears the burden of proof on the question of whether preauthorization should be denied. 28 TAC § 148.21(h).

⁶Texas Workers Compensation Act (Act), TEX. LAB. CODE ANN. § 401.011.

2. Analysis

The conflicting testimony in this case indicates that the need for and use of a discogram is generally controversial. The record includes assessments by four physicians regarding the preauthorization request for a discogram with CT scan. Two doctors evaluated Claimant's medical records as well as the requesting doctor's rationale for performing the treatment: they concluded the treatment is unnecessary and may even cause more harm than good. In contrast, the treating physician indicated he is unable to treat Claimant's pain without this diagnostic tool. The IRO evaluating doctor agreed.

As the treating physician, Dr. Mohamed's testimony on the need for a discogram for this particular patient was cogent, heartfelt, and persuasive. He was a strong advocate for his patient, whom he has been treating for approximately two years.⁷ He agreed that there are associated risks with the procedure, but he stated he "absolutely" would not perform a discogram unless it would help. The IRO doctor apparently found the request reasonable, finding that:

The medical record documentation indicates that the precise location of the patient's pain still remains unknown. Discogram can not only be a positive benefit (that is to be used to define treatment to the specific offending disc) but can also be a negative benefit (to identify patients with multi-level symptomatic pathology and therefore eliminate non-indicated surgical treatment possibilities). Performing a CT/discogram on this patient may avoid future ill-advised treatment if he is found to have symptomatic disc disease at multiple levels. . . . [the post CT scan] may be useful to better identify bone spurs seen on the MRI and will add more specificity to the discogram. Therefore, a lumbar discogram with post CT scan is medically necessary."⁸

The testimony of Dr. Joyner was also persuasive, given his knowledge and experience. During Dr. Mohamed's *pro se* cross examination of Dr. Joyner, the two colleagues obviously disagreed on the best treatment for Claimant and the use of the proposed discogram as a beneficial diagnostic tool. But the exchange highlighted that the dispute can be pared down to a professional disagreement on treatment. Viewed as such, the ALJ gave more weight to the testimony of the doctor who had physically examined and worked with the patient over a number of years, rather than to the expert who had not seen Claimant.

The ALJ gave little weight to Dr. Tsourmas' testimony because he had less experience using a discogram than either Dr. Joyner or Dr. Mohamed. Moreover, Dr. Joyner's testimony conflicted with two statements made by Dr. Tsourmas: that a discogram is rarely performed on four levels of the spine and that the procedure is so subjective that it should not be performed by another doctor.

⁷Based on the testimony of Dr. Joyner, who stated he reviewed approximately two years of Claimant's medical records with Dr. Mohamed as the treating physician.

⁸Petitioner Ex. A at 2.

The ALJ also gave little weight to the reports of Drs. Reuben, Patel, and Buck, which did not directly address the dispute at issue.

In the ALJ's view, the overall evidence demonstrates the medical necessity of the requested treatment, a discogram with post CT scan.

III. FINDINGS OF FACT

1. On _____, the Claimant suffered an injury to the lumbar spine and left finger that was a compensable injury under the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. § 401.001 *et seq.*
2. Following his injury, and despite treatment, the Claimant suffers from chronic low back pain without radicular symptoms.
3. On or about March 11, 2002, Dr. S. Ali Mohamed requested preauthorization from Petitioner Texas Mutual Insurance Company for a lumbar discogram with post CT scan at levels L2-L3, L3-L4, L4-L5, and L5-S1.
4. The proposed lumbar discogram with CT scan may define treatment to the specific offending disc or may be used to identify a multi-level symptomatic pathology and eliminate the possibility of non-indicated surgical treatment. A post CT scan may be useful to better identify bone spurs seen on a previous MRI and add more specificity to the discogram.
5. Petitioner denied the request for preauthorization.
6. Subsequent to Petitioner's denial for preauthorization, Respondent S. Ali Mohamed, M.D. timely requested an independent review by the Texas Medical Foundation's independent review organization (IRO) as specified by the Texas Workers' Compensation Commission (Commission) rules.
7. The IRO issued its decision on August 9, 2002, concluding that the request for a lumbar discogram with post CT scan should be approved. Petitioner timely appealed this decision.
8. On or about August 29, 2002, the Commission received a timely request for a hearing with the State Office of Administrative Hearings (SOAH) from the Petitioner.
9. The Commission mailed notice of the hearing's setting to the parties on October 21, 2002. The Commission mailed an amended notice on November 5, 2002, using a different address for the notice sent to Dr. Mohamed.
10. A hearing in this matter was convened on November 19, 2002, at the William P. Clements Building, 300 W. 15th St., Austin, Texas, before Lilo Pomerleau, an Administrative Law Judge with SOAH. All parties were present.
11. A discogram can not only be a positive benefit (that is to be used to define treatment to the specific offending disc) but can also be a negative benefit (to identify patients with multi-

level symptomatic pathology and therefore eliminate non-indicated surgical treatment possibilities).

12. Performing a discogram with a post CT scan on Claimant may avoid future ill-advised treatment and assist the treating doctor with any future percutaneous procedures.
13. A discogram may help determine whether Claimant's pain is caused by pressure (bulging) or by chemicals released from the nucleus of spinal disks, which are irritating nearby spinal nerves. This knowledge will assist the treating physician in determining future appropriate treatment.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issues presented pursuant to the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. § 401.001 *et seq.*, § 413.031.
2. The State Office of Administrative Hearings (SOAH) 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.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. ch. 2001, and SOAH's procedural rules at 1 TEX. ADMIN. CODE ch. 155.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TEX. ADMIN. CODE § 148.21(h).
6. Based upon the foregoing Findings of Fact, the lumbar discogram with CT scan requested for the Claimant's diagnosis and treatment represents an element of health care medically necessary under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact, the lumbar discogram with CT scan requested for the claimant's diagnosis and treatment is consistent with the Commission's Spine Treatment Guideline.

ORDER

IT IS THEREFORE, ORDERED that preauthorization for a lumbar discogram with a post CT scan, as requested for the diagnosis and treatment of Claimant_____, be approved.

SIGNED this 9th day of December, 2002.

LILO POMERLEAU
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS