

**DOCKET NO. 453-03-1020.M2**  
**[MDR TRACKING NO. M2-02-0894-01]**

<p>_____, <b>Petitioner</b></p> <p>V.</p> <p><b>TEXAS WORKERS' COMPENSATION COMMISSION and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,</b> <b>Respondents</b></p>	<p>§ § § § § § § § §</p>	<p style="text-align:right"><b>BEFORE THE STATE OFFICE</b></p> <p style="text-align:right"><b>OF</b></p> <p style="text-align:right"><b>ADMINISTRATIVE HEARINGS</b></p>
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**DECISION AND ORDER**

\_\_\_\_\_ (Petitioner) has appealed the findings of Independent Review, Inc. (IRI) affirming the denial by Travelers Indemnity Company of Connecticut (Carrier) of pre-authorization for a lumbar discogram<sup>1</sup> followed by a CT<sup>2</sup> scan. The Administrative Law Judge (ALJ) holds that pre-authorization should be ordered for the requested treatment because it is medically necessary to promote Claimant's recovery.

**I. JURISDICTION, NOTICE, AND VENUE**

The Texas Workers' Compensation Commission (the Commission) has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T CODE ANN. Chapter 2003. 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.

Notice of the hearing was sent to the parties on November 12, 2002. Notice and jurisdiction are not contested and are addressed in the Findings of Fact and Conclusions of Law set out below.

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<sup>1</sup> A discogram is a roentgenogram of an intervertebral disk made after injection of a radiopaque substance. *Merriam Webster's Medical Dictionary* (1995) at 181. A roentgenogram is a photograph made with x-rays. *Id.* at 606.

<sup>2</sup> A CT scan is radiography in which a three-dimensional image of a body structure is constructed by computer from a series of plane cross-sectional images made along an axis. *Id.* at 133.

ALJ Sharon Cloninger convened the hearing December 11, 2002, in the William Clements Building, Fourth Floor, 300 West 15<sup>th</sup> Street, Austin, Texas. Petitioner appeared by telephone and was assisted by Ombudsman Juan Mireles, who appeared in person. Carrier appeared through Dan Flanagan, its representative for the Austin area. The Commission did not participate in the hearing.

## II. BACKGROUND

Petitioner incurred a compensable injury to his back on \_\_\_\_\_, while bending over to pick up a two-inch pipe that was 17 feet long at \_\_\_\_\_, his place of employment. His treatment has included medication, physical therapy, work hardening, and general conservative low back pain management, but he continues to experience back pain to the extent that he cannot do any manual labor, stand upright for longer than an hour or so, or sit in a chair in a normal fashion. He spends most of the day lying on his side on the couch.

He has been treated by several doctors, including orthopedic surgeon Thomas Cartwright, M.D., who on May 22, 2002, requested pre-authorization for a lumbar discogram followed by CT scan to ascertain the source of Petitioner's pain and whether Petitioner's pain could be relieved by spinal fusion surgery. The request was denied by Carrier. Petitioner requested an appeal of Carrier's denial before the Commission's Medical Review Division. The Commission referred the appeal request to an independent review organization (IRO). On September 23, 2002,<sup>3</sup> the IRO recommended non-authorization because (1) lumbar discograms have equivocal results and (2) Petitioner has no objective neurological findings and would not be a candidate for surgical procedure.

On October 16, 2002, Petitioner appealed the IRO decision, which culminated in this hearing before SOAH.

## III. DISCUSSION

### A. Applicable Law

The only issue in this case is whether, by a preponderance of the evidence, there is medical necessity for the requested treatment. Medical necessity is defined in TEX. LABOR 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

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<sup>3</sup> The IRO sent a corrected review to Petitioner on October 7, 2002, having changed the date of injury from \_\_\_\_\_, to \_\_\_\_\_.

the compensable injury;

- (2) promotes recovery; or
- (3) enhances the ability of the employee to return to or retain employment.

Pursuant to 28 TAC § 134.600(g), Petitioner may proceed to medical dispute resolution (MDR) before the Commission upon denial of pre-authorization by the Carrier. Effective January 1, 2002, MDR may be conducted by an IRO. 28 TAC § 133.308. In accordance with the requirement for the Commission to randomly assign cases to IROs, the Commission assigned Petitioner's MRD request to IRI for independent review.

Under 28 TAC §148.21(h), the appealing party has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LABOR CODE ANN. § 413.031. Thus, Petitioner must prove the requested lumbar discogram followed by CT scan is reasonably required within the meaning of TEX. LABOR CODE ANN. § 408.021(a).

## **B. Evidence**

Petitioner testified on his own behalf, and offered one document, which was admitted. Carrier offered one document, which was admitted.

### **1. Petitioner's testimony**

Petitioner testified that by the third day after his injury, despite having been prescribed pain relievers and muscle relaxants, he was in so much pain he could not get up off the floor. Later, his treatment included four steroid injections, pain management, and physical therapy, which eventually got him back on his feet, but for no more than an hour at a time before his knees buckle. Muscle relaxants and pain relievers give him minimal relief; he mainly takes Tylenol for his pain. He said that because of the constant, throbbing pain in his back, he spends most of the day lying on his side on the couch. If he gets up, the pain intensifies. He described himself as "helpless." Although he knows a discogram would be painful, he would like to have the procedure, in the hopes that it could lead to improvement of his current condition.

### **2. Documentary evidence<sup>4</sup>**

X-rays of Petitioner's lumbar spine taken \_\_\_\_\_-the day after Petitioner's injury-at KSF Orthopaedic Center in Houston, Texas, depict five free lumbar vertebrae, with marginal

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<sup>4</sup> The pages are not numbered in either Respondent's exhibit or Petitioner's exhibit, so references to the exhibits do not contain page numbers.

degenerative changes. The interspaces of L3-4 and L4-5 show minimal rotation toward the right. The report states the images show a normal study of the lumbar spine with a suggestion of minimal rotary changes toward the right and minimal degenerative changes in the interspaces of L3-4 and L4-5. (Respondent's Exhibit 1).

A month later, on October 19, 2000, an MRI was performed on Petitioner's spine at Fallbrook Open MRI in Houston, Texas. Based on the MRI, Judson Snow, M.D., diagnosed Petitioner to have degeneration and shallow bulging of the L5-S1 disc. Dr. Snow reported the L5-S1 disc to be diminished in intensity, consistent with degeneration. He said the MRI depicted shallow, symmetrical posterior annular bulging contained by anterior epidural fat; the bulging does not deform the thecal sac. He reported the central canal and the foramina to remain adequate in size. (Petitioner's Exhibit 1).

In a letter to the Commission dated August 28, 2001, J. Anthony Walter, M.D., an orthopedic surgeon, disagreed that Petitioner is at Maximum Medical Improvement (MMI) as determined by Dr. Michael Perlman on March 22, 2001. Dr. Walter stated Petitioner was under his care at that time for lumbar radiculopathy resulting from his compensable injury. The letter states that before being referred to Dr. Walter, Petitioner was under the care of Dr. Sepulveda<sup>5</sup> for x-rays and medication. The letter outlines Petitioner's treatment, stating an MRI scan done on October 19, 2000, revealed degenerative disc disease changes and bulging at the L5-S1 disc. An EMG done November 20, 2000, revealed a possible right L5 root irritation. A lumbar CT scan on May 28, 2001, revealed a small central disc protrusion L5-S1, but was otherwise normal. A lumbar myelogram on June 14, 2001, revealed minimal disc bulging at L4-5 but was otherwise negative. A bone scan on June 27, 2001, revealed mild arthritic changes of the knees and was otherwise negative. (Petitioner's Exhibit 1).

Dr. Walter's letter goes on to state that Petitioner was referred to Dr. Graham on July 12, 2001, for a second opinion. Dr. Graham advised Petitioner to proceed with a lumbar discogram to determine the need for a possible lumbar fusion. It is Dr. Graham's opinion that if the discogram is positive, Petitioner's condition would improve with lumbar fusion. (Petitioner's Exhibit 1).

Petitioner was given a 4% total body impairment by Dr. Walter with an MMI date of May 18, 2001, but Dr. Walter rescinded the MMI on August 2, 2001, based on Dr. Graham's recommendation for a lumbar discogram and possible fusion. Petitioner was seen by Dr. Michael Perlman, his designated doctor and was placed at MMI as of March 22, 2001 and given a 6% total body impairment. Based on Dr. Graham's recommendation for a possible spinal fusion, Dr. Walter does not agree that Petitioner is at MMI. (Petitioner's Exhibit 1).

In a November 5, 2001 letter to Carrier, Thomas J. Cartwright, M.D., of KSF Orthopaedic Center in Houston, Texas, said Petitioner was seen in his office on that day exhibiting low back pain that was achy, but mostly burning, tingling, and shooting. He reviewed Petitioner's lumbar myelogram report dated June 14, 2001, and Petitioner's lumbar MRI, among other medical records,

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<sup>5</sup> Raul Sepulveda, M.D., is a neurosurgeon with KSF Orthopaedic Center in Houston, Texas.

and found degenerative dessication and narrowing at the L5-S1 level. Dr. Cartwright concluded that if Petitioner's pain is discogenic, surgery might be an option. Dr. Cartwright recommended a lumbar discogram at the L4-5 and L5-S1 levels. He said if Petitioner's pain is concordantly reproduced at the L5-S1 level and L4-5 level is negative, he thinks Petitioner would do well with an isolated interbody fusion at the L5-S1 level. He said if the discogram is negative, then Petitioner is likely at MMI and would need a functional capacity evaluation (FCE) to determine at what capacity he could work. (Petitioner's Exhibit 1, Respondent's Exhibit 1).

#### **IV. ANALYSIS**

Petitioner has met his burden of establishing that the requested lumbar discogram followed by CAT scan is medically necessary and that the treatment should be pre-authorized. It is uncontroverted that Claimant's low back pain results from his compensable injury. It is more likely than not that the lumbar discogram followed by CT scan could promote Petitioner's recovery by identifying whether the source of Petitioner's pain can be corrected by spinal fusion surgery. While Dr. Perlman found Petitioner to be at MMI, Dr. Walter rescinded his finding of MMI, based on Dr. Graham's recommendation that Petitioner be given a lumbar discogram that could possibly lead to spinal fusion surgery. Dr. Cartwright also recommends the discogram and possible spinal fusion surgery as the only treatment left that might promote Petitioner's recovery.

The ALJ found it persuasive that Petitioner's treating doctor, Dr. Walter, rescinded his finding of MMI, and that two additional doctors—Dr. Graham and Dr. Cartwright—recommend that Petitioner be given a discogram to determine if spinal fusion surgery could improve his condition.

There is sufficient evidence to prove the requested lumbar discogram followed by CT scan could identify the source of Petitioner's back pain and lead to surgery that could afford Petitioner relief and promote his recovery. Thus, Petitioner is entitled to pre-authorization of the requested treatment under TEX. LABOR CODE ANN. § 408.021(a).

#### **IV. FINDINGS OF FACT**

1. Petitioner suffered a compensable injury to his back on \_\_\_\_\_, while lifting a two-inch pipe that was 17 feet long in performance of his duties as an employee of \_\_\_\_\_
2. Travelers Indemnity Insurance Company of Connecticut (Carrier) was \_\_\_\_\_ insurance provider at the time of Petitioner's injury.
3. Petitioner has been treated for his compensable injury by several doctors including J. Anthony Walter, M.D., an orthopaedic surgeon in Houston, Texas; Thomas Cartwright, M.D., a spine surgeon with KSF Orthopaedic Center in Houston, Texas; and Dr. Graham.
4. Since Petitioner's compensable injury occurred, he has developed low back pain directly related to his injury.
5. Petitioner has degeneration and shallow bulging of the L5-S1 disc.
6. The discogram could lead to spinal fusion surgery which would improve Petitioner's condition.

7. Based on Dr. Graham's recommendation, Dr. Walter on August 2, 2001, rescinded his May 18, 2001 finding that Petitioner had reached Maximum Medical Improvement (MMI).
8. On May 22, 2002, Dr. Cartwright requested pre-authorization from Carrier for Petitioner to undergo a lumbar discogram followed by CT scan.
9. Carrier denied Dr. Cartwright's request for pre-authorization for the discogram.
10. Petitioner filed a timely request with the Texas Workers' Compensation Commission (TWCC) for medical dispute resolution.
11. Petitioner's request was randomly assigned to Independent Review, Inc. (IRI), an independent review organization, by the Commission's Medical Review Division.
12. IRI issued a decision September 23, 2002, recommending denial of Petitioner's request for pre-authorization, and issued a second decision on October 7, 2002, correcting Petitioner's date of injury from \_\_\_\_\_, to \_\_\_\_\_.
13. Petitioner filed a timely request for hearing October 16, 2002.
14. Notice of the hearing was sent to the parties on November 12, 2002.
15. 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.
16. Administrative Law Judge Sharon Cloninger convened the hearing December 11, 2002, in the William Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. Petitioner appeared *pro se* by telephone, with the assistance of Ombudsman Juan Mireles, who appeared in person. Carrier was represented by Dan Flanagan, its Austin-area representative. The Commission did not participate in the hearing.

## **V. CONCLUSIONS OF LAW**

1. TWCC has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ch. 401 *et seq.* (Vernon 1996).
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(d) 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. Petitioner met his burden of proving that the lumbar discogram with CT scan is medically necessary and reasonably required within the meaning of TEX. LAB. CODE ANN. § 408.021(a).
6. Based on the foregoing Findings of Fact and Conclusions of Law, the requested lumbar discogram with CT scan should be pre-authorized.

**ORDER**

**IT IS, THEREFORE, ORDERED** that Travelers Indemnity Company of Connecticut should pre-authorize the lumbar discogram with CT scan requested for the treatment of

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**SIGNED this 9<sup>th</sup> day of January, 2003.**

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**SHARON CLONINGER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**