

J.A.S., M.D. AND _____	§	
<i>Petitioners</i>	§	BEFORE THE STATE OFFICE
	§	
VS.	§	
	§	OF
AMERICAN COMPANY OF	§	
READING,	§	
<i>Respondent.</i>	§	ADMINISTRATIVE HEARINGS

**DECISION AND ORDER**

\_\_\_\_\_ (Claimant) and his treating physician, J.A.S., M.D. (Dr. J.A.S.) (collectively, Petitioners)<sup>1</sup> have appealed an Independent Review Organization's (IRO's) conclusion that American Company of Reading (Carrier) was correct in denying preauthorization for an IDET procedure<sup>2</sup> because IDET therapy is not medically necessary for this Claimant. The Administrative Law Judge finds that Petitioners have not met their burden of proving that the IDET procedure is medically necessary to treat Claimant's back pain. Therefore, the judge declines to order the Carrier to authorize the procedure.

I.  
DISCUSSION

A. **Background Facts**

While working as a warehouse supervisor for \_\_\_\_, Claimant suffered a compensable back and neck injury on \_\_\_\_, when he fell from a ladder. On August 17, 2001, he began receiving medical treatment for back pain from Dr. J.A.S, an orthopedic surgical doctor who treated Claimant with drug therapy, physical therapy, a TENS unit, botox injections, and epidural injections.<sup>3</sup> He now recommends that Claimant undergo an IDET procedure at L4-L5 and L5-S1 to relieve his persistent back pain. Claimant has also been evaluated by Dr. Lamarre, Dr. Sedighi, Dr. Crisp, and Dr. Slaughter, M.D.

2. **Procedural History**

Carrier denied Dr. J.A.S.'s request for IDET preauthorization on the grounds that the documentation submitted was inadequate to support performing the procedure. Dr. J.A.S. then sought preauthorization through the IRO process, but did not prevail.<sup>4</sup> This appeal to SOAH followed.

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<sup>1</sup> Dr. J.A.S. and Claimant appealed the same IRO determination separately; both appeals were placed under this SOAH docket number.

<sup>2</sup> The acronym *IDET* refers to Intradiscal Electrothermal Therapy or Intradiscal Electrothermal Anuloplasty and Nucleotomy.

<sup>3</sup> Ex. 1 at 15-23.

<sup>4</sup> The IRO process is governed by Commission rules published at 28 TEX. ADMIN. CODE § 133.308(v).

The hearing was convened on June 6, 2003, at 3:30 p.m., before State Office of Administrative Hearings (SOAH) Judge Deborah L. Ingraham. Dr. J.A.S. appeared by telephone and represented himself. Claimant also appeared by telephone and was assisted by Texas Workers' Compensation Commission (Commission) Ombudsman Luz Loza. Attorney Mark Sickles represented the Carrier.

The presiding judge considered and denied Dr. J.A.S.'s request for a three-month continuance to conduct discovery because the discovery the doctor planned to conduct consisted of routine questions he could ask the Carrier's expert witness on cross-examination during the hearing. The evidentiary hearing proceeded and Petitioners rested their respective cases at approximately 5:40 p.m.

The Carrier then proceeded with its case, but was unable to reach its expert witness, N. F. Tsourmas, M.D., to elicit his testimony by telephone. Carrier requested an opportunity to submit the testimony at a later time, subject to cross-examination, due to the late hour and the sudden unavailability of his witness. Dr. J.A.S. and Claimant objected, arguing that since Dr. J.A.S.'s motion for a three-month continuance was denied, it was unfair for Carrier to now receive a continuance. Because Petitioners' evidentiary presentations were unexpectedly lengthy and allowing witnesses to appear by telephone can easily result in confusion over when the witness must be present at the proceeding, the judge granted the Carrier leave to make a good cause showing why its witness was unavailable at 5:40 p.m. Dr. J.A.S.'s objection to that ruling was overruled.<sup>5</sup>

On June 11, 2003, Carrier filed a statement from Dr. Tsourmas explaining that he was in a deposition in his office at 5:40 p.m. and did not receive Carrier's telephone call because his reception area had closed for the day. Based on Dr. Tsourmas' explanation and the unexpected length of the Petitioners' evidentiary presentations at the hearing, the ALJ found good cause to allow Dr. Tsourmas' testimony, subject to cross-examination. The hearing was reconvened for that purpose on July 9, 2003, and was adjourned the same day. All parties appeared either in person or by telephone and had an opportunity to question Dr. Tsourmas. The record closed after the parties filed their written closing arguments on July 21, 2003.

### 3. Applicable Law

The Texas Labor Code contains the Texas Workers' Compensation Act (Act) and provides the relevant statutory requirements regarding compensable treatment for workers' compensation claims.<sup>6</sup> In particular, the Act provides in pertinent part that:

(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;

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<sup>5</sup> The judge has discretion to call all necessary witnesses. *See* 28 TEX. ADMIN. CODE § 148.17.

<sup>6</sup> TEX. LAB. CODE ANN. § 408.021

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

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Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.<sup>7</sup>

#### **D. Burden of Proof**

**An IRO decision is deemed a Commission decision and order under** Commission Rule 133.308 (p)(5). Commission Rule 133.308(w) provides that, in all appeals from reviews of prospective or retrospective [medical] necessity disputes, an IRO decision has presumptive weight.<sup>8</sup> The burden of proof in this case was on Petitioners to prove by a preponderance of the evidence that the procedure they seek is a reasonable and necessary medical treatment.<sup>9</sup>

#### **E. IRO Decision**

In its report issued on March 14, 2003, the IRO agreed with Carrier's determination to deny preauthorization because:

[t]he request for IDET is based upon provocative discography that, by examination, reveals incomplete findings otherwise not warranting an intradiscal electrothermocoagulation. There is no indication in the provocative discography report regarding manometry, nor is there any subjective report as to the amount of pressure at each disc. In addition, the most remarkable pain reported was mild discordant pain at the L3-L4 disc and the L4-L5 disc. Mild back pain was reported at the L5-S1 disc.

With no indication of significant concordant pain at least one level with an acceptable control level and without any indication of manometry readings. I do not find it reasonable to proceed with IDET therapy. This is in keeping with Saal criteria suggestions regarding determination of patients for IDET therapy.<sup>10</sup>

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<sup>7</sup> TEX. LAB. CODE ANN. § 401.011(19)

<sup>8</sup> See 28 TEX. ADMIN. CODE § 133.308 (p)(5), (w).

<sup>9</sup> See 28 TEXAS ADMIN. CODE § 148.21(h), (i).

<sup>10</sup> Ex. 2 at 00003.

## **F. ALJ's Analysis**

### **1. The IDET Procedure.**

IDET is a method used to manage chronic discogenic low back pain. During the procedure, the physician inserts a catheter into the painful disc and applies controlled levels of thermal energy (heat) to a broad section of the affected disc to alter the structure and sensitivity of the disc wall. Among the desired effects of the procedure are contraction of collagen tissue and desensitization of the nerve tissue within the disc.

### **2. IDET inclusion and exclusion criteria - the Saal study criteria**

#### **ALJ's Analysis**

Dr. J.A.S. testified that Claimant meets all of the IDET criteria because he suffers leg pain and function-limiting low back pain; his MRI shows a herniated disc at L4-L5; non-operative treatments have failed; his neurological examination is normal; and his August 5, 2002 discogram shows tearing of discs at L4-L5 with concordant pain at L5-S1. Dr. J.A.S. also emphasized that an IDET procedure would be less invasive than a spinal fusion surgery and perhaps obviate the need for surgery altogether.

Claimant testified that he is in constant pain. To support his request for the IDET procedure, he relied on Dr. J.A.S.'s evaluation as well as the evaluation from Dr. Lamarre, who agreed the IDET procedure was an option, subject to an opinion from a neurosurgeon to determine whether Claimant is a surgical candidate given his congenitally small spinal canal. Claimant agrees with Dr. J.A.S. that the IDET procedure would be a more conservative approach compared to a spinal surgery, and he is willing to undergo the procedure in the hope that he will be able to return to work and support his family.<sup>11</sup> Finally, he argues that the Texas Labor Code entitles him to health care that will relieve the effects naturally resulting from his compensable injury.<sup>12</sup>

### **4. Carrier's Position**

Carrier argues that it properly denied the preauthorization request because inadequate documentation supported performing the procedure; the procedure is not cost effective; and Claimant does not meet the Saal criteria. Carrier also urged that, in addition to the six Saal criteria recited above, Claimant must be a candidate for antibody fusion; must be offered the surgery; and must decline the surgery to qualify for an IDET procedure. The judge notes that while the prospect of surgery may be a factor, the Saal study does not explicitly identify the status of surgery options as a formal IDET criterion.

In response to Petitioners' arguments, Carrier relies on Dr. Sedighi's independent medical examination in which the doctor concluded that Claimant has several positive Waddell signs, which suggest histrionics or exaggeration of his pain. Dr. Crisp's conclusion that Claimant's cervical

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<sup>11</sup> See Claimant's Direct Testimony; Claimant's Closing Brief.

<sup>12</sup> TEX. LAB. CODE ANN. § 408.021(a)(1).

studies do not show a need for surgery and Dr. Slaughter's opinion that Claimant may exaggerate his symptoms are also central to Carrier's position.<sup>13</sup>

Carrier's medical expert, Dr. Tsourmas, explained when he testified that the IDET procedure became popular from 1999 to 2001 as a cure-all for low back pain, but has since fallen out of favor with many practitioners. He agreed that IDET is sometimes a reasonable alternative to surgery, but not in Claimant's case. After finding several contraindications to performing the procedure in Claimant's medical records, Dr. Tsourmas concluded that Claimant is a very poor IDET candidate. He based his medical opinion on the following contraindications:

- a) Claimant's September 6, 2001 MRI of the lumbar spine shows demonstrable evidence of nerve root impingement and constitutes an absolute contraindication because the IDET procedure could irreparably harm the nerve root lying in proximity to the disc;
- b) Signs of Claimant's symptom exaggeration and pain magnification in his psychological examination are contraindications for an invasive and perhaps outdated procedure like IDET;
- c) Claimant's August 5, 2002 discogram is inconclusive and of questionable validity because the disc spaces hold the same volume of injectate notwithstanding the presence of a radial annular tear at L4-L5 and L5-S1;
- d) During the discogram, Claimant reported only mild concordant pain, rather than exact pain at the levels tested.; and
- e) Claimant's August 5, 2002 CT scan demonstrates a bulging disc touching the spinal cord area (cord effacement).

For those reasons, Dr. Tsourmas does not think Claimant qualifies as an IDET candidate.

## **5. ALJ's Analysis**

The parties do not dispute that Claimant meets the following Saal criteria:

- < Six months of low back pain;
- < No improvement after comprehensive non-operative care;
- < Normal neurological findings; and
- < Negative results on the straight leg raise;

At issue, then, is whether Claimant meets the remaining two Saal criteria:

- An MRI scans that does not show a neural compressive lesion; and
- Concordant pain reproduction with provocative discography at low pressurization.

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<sup>13</sup> Carrier's Closing Brief at 2.

**MRI Results:** According to the Saal study, a proper IDET candidate's MRI scan must not show a neural compressive lesion. The medical records in evidence contain the results of an MRI performed on Claimant's lumbar spine on September 6, 2001. That MRI result showed:

- C [a] 4 millimeter left paracentral disc protrusion at L4-L5 with disc material impinging on the anterior surface of the left L5 nerve root sheath as it passes through the proximal portion of the left lateral recess. The disc material also extends to the inferior portion of the left neural foramen, contacting the inferior surface of the existing left lateral recess and moderately narrows the left foramen at this segment;
- C Mild bilateral lumbar facet joint hypertrophy at L5-S1;
- C Minimal lumbar disc dehydration at L4-L5; and
- C Congenitally small lumbar spinal canal.<sup>14</sup>

In Dr. J.A.S.'s medical opinion, the MRI result does not preclude Claimant's IDET candidacy because it does not demonstrate, and does not mention, the presence of a neural compressive lesion. Rather, Claimant has a disc herniation that causes stenosis.<sup>15</sup>

After considering the Saal study and Dr. Tsourmas' testimony on direct and cross-examination, the ALJ agrees with Dr. J.A.S. that the study does not identify nerve root impingement as a factor that would exclude a patient from receiving the IDET procedure. In fact, Figure 2 in the study depicts a study patient's clinical history in which that patient's MRI scan demonstrated central disk protrusion. Here, Claimant's MRI also shows a disc protrusion. Although the study patient's history does not mention nerve root impingement, Dr. J.A.S.'s testimony and argument persuaded the judge that if nerve root impingement with a disc protrusion was an excluding factor, the Saal study would have mentioned it. Therefore, she concludes that Claimant meets the Saal MRI criterion.

**Discography:** A proper IDET candidate must also manifest concordant pain reproduction with provocative discography at low pressurization. The quality of Claimant's discogram is disputed by all parties. The medical records in evidence contain the result of the discogram from August 8, 2002, which showed 1) mild discordant back pain and posterolateral radial annular tear with extravasation on the left at L4-L5; 2) mild discordant low back pain at L3-L4 and mild anterior radial annular tear; and 3) an equivocal mild low back pain response with injection of the L5-S1 intervertebral disc, which appeared unremarkable.<sup>16</sup>

Dr. Tsourmas considered this test inconclusive and of questionable validity because the disc spaces hold the same volume of injectate notwithstanding the presence of a radial annular tear at L4-

L5 and L5-S1. He also noted that Claimant reported only mild concordant pain, rather than exact pain at the levels tested. Dr. J.A.S. speculated that the discographer over-sedated Claimant during

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<sup>14</sup> Ex. 2 at 000044-45.

<sup>15</sup> The parties did not address whether stenosis is a precluding factor.

<sup>16</sup> Ex. 1 at 26

the test, which would account for the equivocal low back pain at L5-S1. At the hearing Claimant testified that, contrary to the discographer's test result reading, he experienced significant pain and pressure during the discogram.

The ALJ cannot give Dr. J.A.S.'s testimony regarding over-sedation much evidentiary weight because it was fairly speculative and unsupported by other evidence. Likewise, Claimant's recollection of his pain experience today is less reliable than the experience he reported at the time of the test. That leaves Dr. Tsourmas' opinion, the test result itself, and the Saal criterion as the deciding factors.

Ultimately, the judge agrees with Dr. Tsourmas that the discogram is of questionable validity because Claimant's pain reproduction was either discordant or equivocal at the spinal levels tested. Moreover, the Saal study specifically states that the pain reproduction must occur with provocative discography at low pressurization—*at less than 1 milliliter (ml) dye volume*. Claimant's Radiology Imaging Report indicates that 1.4 ml of contrast solution was injected at L3-L4 and L4-L5 and 1.2 ml was injected at L5-S1. The incorrect amount of contrast solution further calls into question the validity of the discogram result in assessing Claimant's need for IDET therapy. For those reasons, the ALJ concludes that Claimant's discogram does not meet the last Saal criterion.

Finally, the ALJ carefully reviewed Dr. Lamarre's report, which Claimant emphasized in his written closing argument. Although Dr. Lamarre indicated that Claimant was ready for the IDET procedure, she did not specifically discuss or evaluate the Saal criteria or the MRI and discogram results.<sup>17</sup> Therefore, Dr. Lamarre's assessment, while important, did not present the entire picture with respect to the more specific qualifying criteria.

## **6. Conclusion.**

Claimant would very much like to return to work but for his back pain. A cost-effective, outpatient procedure with a reasonable recovery time is understandably a favorable option in his eyes. The ALJ found Claimant's testimony compelling and commends the Ombudsman's assistance of Claimant's case. The evidence, however, does not support the request for the IDET procedure in this case. The judge understands that Dr. J.A.S. and Claimant will find this conclusion frustrating, especially given that Claimant qualifies on five of the six criteria. But with the discogram being of questionable validity and the dye volumes being incorrect, Petitioners failed to carry their burden of proof. For the foregoing reasons, the ALJ concludes that the requested IDET procedure is not reasonable or medically necessary for Claimant's compensable injury and should not be preauthorized.

## **II. FINDINGS OF FACTS**

1. \_\_\_\_ (Claimant) suffered a compensable back and neck injury on \_\_\_\_, when he fell from a ladder while working at \_\_\_\_.

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<sup>17</sup> Ex. 2 at 000038. Weight loss and Claimant's exaggeration of symptoms were other medical issues of concern to his treating doctor. The record shows that Dr. J.A.S raised the weight loss issue with respect to surgery, not the IDET. Claimant's potential symptom magnification as a contraindication is, however, a legitimate concern based on the psychology report in evidence. *See* Ex. 2 at 00026-27.

2. On August 17, 2001, Dr. J.A.S., an orthopedic surgeon, began treating Claimant's back pain with drug therapy, a TENS unit, botox injections, physical therapy, and epidural injections.
3. Dr. J.A.S. recommends that Claimant undergo an Intradiscal Electrothermal Therapy (IDET) procedure at lumbar spine levels L4-L5 and L5-S1 to relieve his persistent back pain.
4. Carrier denied preauthorization for the IDET procedure.
5. Claimant requested medical dispute resolution through an Independent Review Organization, which reviewed the IDET preauthorization request pursuant to the procedures set by the Texas Workers' Compensation Commission (Commission).
6. The IRO issued a report on March 14, 2003, agreeing with Carrier that the procedure was not medically necessary to treat Claimant's pain because the discography leterevealed incomp findings otherwise not warranting an IDET procedure.
7. Dr. J.A.S. and Claimant appealed the IRO decision to the State Office of Administrative Hearings (SOAH).
8. Notice of the hearing was mailed to the parties on April 16, 2003. 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.
9. The authoritative study on the IDET procedure appears in *Management of Chronic Discogenic Low Back Pain With a Thermal Intradiscal Catheter: A Preliminary Report*, by Joel S. Saal, M.D. and Jeffrey A Saal M.D. (the Saal study).
10. To qualify for IDET therapy, Claimant must meet the six Saal study criteria, which are (1) six months of low back pain; (2) no improvement after comprehensive non-operative care; (3) normal neurological findings; (4) negative results on straight leg raise; (5) MRI scans not showing neural compressive lesion; and (6) concordant pain reproduction with provocative discography at low pressurization.
11. Claimant's September 6, 2001 MRI scan showed a 4 millimeter left paracentral disc protrusion at L4-L5 with disc material impinging on the anterior surface of the left L5 nerve root sheath as it passes through the proximal portion of the left lateral recess.
12. Claimant's MRI does not show a neural compressive lesion.
13. The Saal study does not exclude from IDET therapy patients who have a nerve root impingement;
14. Clamant must also manifest concordant pain reproduction with provocative discography at low pressurization (i.e. at less than 1 milliliter of dye volume) during a discogram to qualify for IDET.

15. Claimant's August 8, 2002 discogram showed 1) mild discordant back pain and posterolateral radial annular tear with extravasation on the left at L4-L5; 2) mild discordant low back pain at L3-L4 and mild anterior radial annular tear; and 3) an equivocal mild low back pain response with injection of the L5-S1 intervertebral disc, which appeared unremarkable.
16. Claimant's Radiology Imaging Report indicates that during the discogram procedure, 1.4 milliliters (ml) of contrast solution was injected at L3-L4 and L4-L5 and 1.2 ml was injected at L5-S1.
17. Claimant's discography does not meet the Saal inclusion criterion because the pain reported was discordant or equivocal; more than 1 ml of dye volume was injected during the procedure; and the discographic appearance of L5-S1 was unremarkable.

### **III. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE § 413.031.
2. 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. ch. 2003.
3. Petitioners timely filed notice of appeal as specified in 28 TEX. ADMIN. CODE § 148.3.
4. Proper and timely notice of the hearing was effected in accordance with TEX. GOV'T CODE § 2001.052 and 28 TEX. ADMIN. CODE § 148.4.
5. Under TEX. LABOR CODE § 408.021(a)(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 that cures or relieves the effects naturally resulting from the compensable injury.
6. Under 28 TEX. ADMIN. CODE § 133.308(v), in all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight.
7. Petitioners failed to carry their burden of proof to show that the IDET procedure is a reasonable and necessary medical treatment for Claimant's injury.
8. Based on the above Findings of Facts and Conclusions of Law, Claimant's request for preauthorization of the IDET procedure should be denied

**ORDER**

IT IS HEREBY ORDERED THAT preauthorization for the IDET procedure requested by Petitioners is DENIED.

**ISSUED this 24th day of September 2003.**

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**DEBORAH L. INGRAHAM**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**  
**ADMINISTRATIVE LAW JUDGE**