

**DOCKET NO. 453-03-4473.M2**  
**MDR Tracking No. M2-03-0948-01**

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|---------------------------------|---|--------------------------------|
| C. T. C.,                       | § | BEFORE THE                     |
| <b>Petitioner</b>               | § |                                |
| VS.                             | § | STATE OFFICE OF                |
|                                 | § |                                |
| <b>TWIN CITY FIRE INSURANCE</b> | § |                                |
| <b>COMPANY, Respondent</b>      | § | <b>ADMINISTRATIVE HEARINGS</b> |

**DECISION AND ORDER**

An injured worker (Petitioner) appealed an Independent Review Organization (IRO) determination that a lumbar discogram and post discogram CT were not medically necessary to treat his lower back injury. Twin City Fire Insurance Company (Carrier) had previously denied the Petitioner's request to authorize the procedures. This decision concludes, based on a preponderance of the evidence, that the procedures were shown to be medically necessary.

**I. PROCEDURAL HISTORY**

A hearing in this matter was convened on December 1, 2003, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH), Austin, Texas. The hearing was originally set to be heard on September 24, 2003, but was continued on the parties agreed motion. The hearing convened on October 2, 2003, but the Petitioner was not present or represented. Thereafter, a SOAH administrative law judge issued a conditional order of dismissal based on the Petitioner's failure to prosecute. Petitioner responded on October 21, 2003, saying he wanted to have a hearing. The case was reset and reconvened on November 10, 2003, but was continued on Petitioner's motion requesting additional time to submit documentary evidence.

The hearing was finally held and closed on December 1, 2003. The Petitioner appeared with the assistance of his doctor, Shane Marcum, D.C. The Carrier appeared and was represented by Attorney Christine Karcher.

Because there are no notice or jurisdiction issues, those matters are addressed in the fact findings and legal conclusions without further discussion here.

## II. DISCUSSION

### 1. Background

Petitioner suffered an at-work injury to his lower back on \_\_\_\_, as a driver for \_\_\_\_, when another vehicle struck his vehicle. He became a patient of Accident and Injury Chiropractic and Dr. Marcum and received extensive treatment. On December 6, 2002, the Carrier denied a requested discogram and CT scan at the L2/L3, L3/L4, L4/L5, and L5/S1 levels of the Petitioner's lumbar spine. On February 17, 2003, the Carrier denied a second request. The IRO decision denying the request was issued on June 26, 2003.

Employees have a right to necessary health treatment under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides, "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 Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

As Appellant, Petitioner had the burden of proof.<sup>1</sup>

### 2. Discussion

#### 1. Petitioner's Evidence

The opinions supporting Petitioner's request are from Phillip R. Kravetz, M.D., and Dee L.

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<sup>1</sup> 28 TEX. ADMIN. CODE § 148(h).

Martinez, M.D. Dr. Kravetz said on August 14, 2002, that the Petitioner's primary complaint was low back pain with leg radiculopathy, with the right greater than the left. His overall impression indicated multiple level degenerative disc and degenerative joint disease of the lumbosacral spine. In his opinion, Petitioner would be a good candidate for a decompressive procedure for his leg symptoms (although the probability of successful surgery to treat degenerative changes in his lumbar spine would be statistically poor).<sup>2</sup>

Dr. Kravetz reported the same symptoms and impression on October 25, 2002. He said at this point, the Petitioner has had all treatments other than surgery. Dr. Kravetz said the Petitioner's magnetic resonance imaging (MRI) examination shows degenerative disc disease at L2/L3, L4/L5, and L5/S1. He concluded that if Petitioner's symptom levels were significant enough to him to want surgery, discography would be reasonable. (The Petitioner had not at that time decided he wanted surgery). Dr. Kravetz stated his belief that, if the Petitioner were symptomatic at the L4-L5 and/or L5-S1 levels only, he would be a good surgical candidate.<sup>3</sup>

On January 6, 2003, Dr. Martinez requested pre-authorization for the discoram. He said the Petitioner had had a series of lumbar epidural steroid injections and lumbar facet injections and an

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<sup>2</sup> Ex. 2 at 64-65.

<sup>3</sup> Ex. 2 at 50-51.

extensive course of conservative medical, physical therapy, and chiropractic care that has reached a plateau in clinical improvement. He has moderate lower back pain and persisting radicular symptoms into both lower extremities.<sup>4</sup> He told the Carrier's peer review doctor that evoked potential testing on the Petitioner was consistent with right S1 radiculopathy.<sup>5</sup>

The Petitioner testified he has pain that starts in his lower back, goes down his leg to his ankle, and then to his back again. He said he is not able to lift objects weighing more than 15 pounds. He said he needs medication to control his pain and has worried about becoming addicted.

Dr. Marcum testified and said the IRO decision (discussed below) was based on faulty information. He indicated the Petitioner has had lumbar facet injections and epidural steroid injections and both have failed. He testified there was a clear indication of pain down the Petitioner's leg from evoked potentials. In his opinion, the evoked potentials are consistent with the Petitioner's complaint. He said the Petitioner has had extensive therapy including work hardening, but his pain levels have remained the same.

## 2. Carrier's Evidence and Argument

The opinions supporting Twin City's positions are from the IRO doctor and peer reviews by T. Wilson, M.D. and R. Shirley, M.D. Dr. Wilson's review of the last preauthorization request said:

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<sup>4</sup> Ex. 2 at 54.

<sup>5</sup> Ex. 2 at 54.

Clinical data presented in support of this request indicates the worker has imaging and electrodiagnostic evidence of nerve root compression that has not responded to conservative treatment with therapy, ESIs and facet injections. While there is a suggestion that decompression of the spinal nerve may be indicated, there is no documentation of the functional abilities and limitations associated with this impairment. Additionally, there is no documentation of a progressive neurological deficit or segmental instability. The medical necessity of spinal fusion cannot be established on the basis of “abnormal” discography. Lumbar discography remains a controversial study in the evaluation of chronic mechanical low back pain.<sup>6</sup>

After reviewing the first preauthorization request, Dr. Shirley agreed with Dr. Wilson, saying, “Results of treatment based on the outcome of discography tend to be erratic particularly in a work comp population.” Dr. Shirley also opined that it is unclear how the discogram will impact the treatment plan, given the fact the Petitioner has already had the benefit of diagnostic imaging.

The IRO doctor’s opinion is based on different reasoning than the peer review doctors. He said:

There is no clearly documented evidence of exhaustion of conservative measures in the management of the claimant’s chronic back condition. There is no documentation of use of medications . . . bracing, spinal stabilization exercises, epidural steroid injections. There is no clearly documented clinical rationale discussing the indications for lumbar fusion in this clinical setting.

The Carrier cited the IRO doctor’s opinions that there was no clear evidence that conservative measures had been exhausted and that the Petitioner’s tests for radiculopathy were negative. It argued the evoked potentials were negative for radiculopathy. It cited Dr. Wilson’s opinion that discography is not useful in determining whether surgery is necessary.

### 3. Analysis

The ALJ concludes the preponderant evidence is that the discogram is medically necessary. The heart of the argument appears to concern the efficacy of discography to determine a need for lumbar surgery under the circumstances of this case. Drs. Martinez and Kravetz obviously think it

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<sup>6</sup> Ex. 2 at 79.

will be helpful—Dr. Kravetz thought spinal decompression could relieve the Petitioner's

radiculopathy. Dr. Martinez also referred to the Petitioner's low back pain and persisting radicular symptoms and said the Petitioner's evoked potentials are consistent with right S1 radiculopathy.

Dr. Wilson said the medical necessity of fusion cannot be established on the basis of abnormal discography. The IRO doctor also referred to spinal fusion. However, Dr. Kravetz suggested spinal decompression to relieve the Petitioner's pain rather than spinal fusion. Spinal decompression is defined as relief of pressure on the spinal cord by means of surgery.<sup>7</sup> Spinal fusion is defined as operative immobilization or ankylosis of two or more vertebrae.<sup>8</sup>

Dr. Wilson said there is a suggestion that decompression of the spinal nerve may be indicated, but there is no documentation of functional abilities and limitations associated with impairment and there is no documentation of progressive neurological impairment. It appears, however, that Dr. Kravetz's primary purpose in considering spinal decompression is pain relief rather than addressing the Petitioner's functional abilities, limitations, or progressive neurological impairment.

Dr. Shirley said simply that results based on the outcome of discography tend to be erratic especially in the workplace population. Drs. Kravetz and Martinez obviously disagree with Dr. Shirley on the efficacy of discography.

The IRO doctor's opinion was significantly discredited by doctors from both sides. His or her primary ground for denying the claim is that conservative care had not been exhausted.

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<sup>7</sup> *Dorland's Illustrated Medical Dictionary* (1994 ed.) at 432.

<sup>8</sup> *Id.* at 670.

However, the Carrier's own peer reviewer, Dr. Wilson, said the Petitioner's symptoms have not responded to conservative treatment. Drs. Kravetz, Martinez, and Marcum all agreed that attempts at conservative care had reached an impasse. The IRO doctor also said there was no documentation of the use of medications or epidural steroid injections. Again, Drs. Wilson, Kravetz, Martinez, and Marcum all referred to epidural steroid injections. The Petitioner discussed his use of medications.

As stated above, the issue of medical necessity appears to turn on the efficacy of discography. Two doctors believe the test can be valuable and two do not. The ALJ concludes, on two bases, that the evidence preponderates in favor of the Petitioner. The first reason is based on the specialties revealed by the record—a doctor's speciality is obviously important in determining his or her expertise.<sup>9</sup> Dr. Marcum testified that Dr. Kravetz is a spinal orthopedist. Dr. Martinez' speciality appears to be family practice<sup>10</sup>—he performed an MRI of the Petitioner's spine and would perform the discogram if approved.<sup>11</sup> By contrast, Dr. Shirley was identified only as “a board certified physician reviewer.”<sup>12</sup> Dr. Wilson was identified simply as “a qualified physician advisor.”<sup>13</sup> Although the IRO physician was shown to be an orthopedic surgeon, as shown above, he or she did not criticize the usefulness of discography and his or her opinion appears to be based on erroneous or incomplete information. From the expertise shown in the record, Dr. Kravetz' opinion was more persuasive.

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<sup>9</sup> *Broders v. Heise*, 924 S.W. 2d 148 (Tex. 1996).

<sup>10</sup> Ex. 2 at 81.

<sup>11</sup> Ex. 2 at 52-53, 71..

<sup>12</sup> Ex. 2 at 38.

<sup>13</sup> Ex. 2 at 77.

The second basis for the ALJ's conclusion is that Drs. Kravetz and Martinez both treated the Petitioner. All other factors being equal, the opinions of doctors who have examined or treated a patient as a general rule carry more weight than those performing paper reviews.

#### IV. FINDINGS OF FACT

1. \_\_\_\_, the Petitioner, suffered an at-work injury to his lower back on \_\_\_\_, as a driver for \_\_\_\_, when another vehicle struck his vehicle.
2. The Petitioner became a patient of Accident and Injury Chiropractic and Dr. Marcum and received extensive treatment.
3. On December 6, 2002, the Carrier denied a requested discogram and CT scan at the L2/L3, L3/L4, L4/L5, and L5/S1 levels of the Petitioner's lumbar spine.
4. On February 17, 2003, the Carrier denied a second request.
5. The Petitioner requested medical dispute resolution before the Texas Workers' Compensation Commission.
6. An independent review organization (IRO) issued a decision denying the request on June 26, 2003.
7. The Petitioner requested a hearing not later than the 20<sup>th</sup> day after he received notice of the IRO decision.
8. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
9. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
10. The Petitioner has not responded to extensive conservative treatment, including lumbar epidural steroid injections and lumbar facet injections, extensive physical therapy, chiropractic treatment, and work hardening.
11. The Petitioner's doctors asked for the discography to determine the need for lumbar decompression.

12. The Petitioner has low back pain with right S1 radiculopathy.
13. Lumbar decompression would be useful in treating the Petitioner's radiculopathy and in relieving his pain.
14. Lumbar discography is useful in determining the need for lumbar decompression.

#### **V. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §2001.052.
3. The Petitioner has the burden of proof. 28 TEX. ADMIN. CODE § 148.21(h).
4. The lumbar discogram and post discogram CT scan were shown to be reasonably required by the nature of the Petitioner's compensable injury. TEX. LAB. CODE ANN. §§ 401.011 and 408.021.
5. Twin City Fire Insurance Company should provide for the lumbar discogram and post discogram CT scan to the Petitioner to treat his \_\_\_\_, at-work injury.

#### **ORDER**

**IT IS, THEREFORE, ORDERED** that Twin City Fire Insurance Company pay for a lumbar discogram and post discogram CT scan to be provided to \_\_\_\_ to treat his \_\_\_\_, at-work injury.

**SIGNED December 17, 2003.**

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**JAMES W. NORMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**