

**FACILITY INSURANCE
CORPORATION,
Petitioner**

V.

**JACOB ROSENSTEIN, M.D.,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Facility Insurance Corporation (Carrier) appealed an Independent Review Organization (IRO) decision that recommended pre-authorization of bilateral facet injections for Claimant, as requested by his doctor Jacob Rosenstein, M.D. (Provider). The IRO concluded the injections were medically necessary. This decision disagrees with the IRO and concludes that the bilateral facet injections are not medically reasonable and necessary to treat Claimant's compensable condition. Therefore, Carrier's appeal is granted.

I. JURISDICTION AND PROCEDURAL HISTORY

There were no challenges to notice or jurisdiction, and those matters are set forth below in the findings of fact and conclusions of law without further discussion here.

Administrative Law Judge (ALJ) Sharon Cloninger conducted a hearing in this case on October 13, 2004, at the State Office of Administrative Hearings (SOAH), William P. Clements State Office Building, Austin, Texas. Attorney Charles C. Finch appeared on behalf of Carrier. Provider failed to appear. The ALJ telephoned Provider at the telephone number listed in the file, and Provider did not answer. The ALJ contacted directory assistance and obtained a second telephone number for Provider, which turned out to be Provider's answering service. The answering service indicated Provider's telephones were not working. The ALJ contacted the SOAH receptionist, and Mr. Finch contacted his office, to find out if Provider had left a different telephone number for the hearing. Provider had not left a different telephone number, so the hearing proceeded without him. The hearing concluded and the record closed that same day.

II. DISCUSSION

1. IRO Decision

Following Carrier's denial of his request for bilateral facet injections for Claimant, Provider requested medical dispute resolution through the Texas Workers' Compensation Commission (the Commission). The Commission referred the dispute to an independent review organization (IRO). After reviewing Claimant's history, the IRO physician, a doctor of osteopathy, disagreed with Carrier's denial of the bilateral facet injections. The IRO physician reasoned that since Claimant had good relief from a series of bilateral facet injections administered in October 2002, "it is obvious that the treatment at this time is conservative as opposed to repeated surgery."¹

2. Evidence²

1. Medical records

According to the documents in evidence, Claimant has a history of low back pain which began after a heavy object fell on him at work on _____. A 1994 lumbar spine fusion at the L4-5 and L5-S1 levels relieved his pain for several years, but beginning in approximately 2001, Claimant's lower back pain returned. He described the pain as a constant aching, occasionally associated with bilateral leg pain.

On October 10, 2002, Provider treated Claimant's low back pain, which was diagnosed as lumbar radiculopathy, with bilateral facet injections at the L3-4, L4-5 and L5-S1 levels of the spine. In follow-up visits with Provider on November 19 and December 17, 2002, Claimant reported that the injections had afforded him little relief and that on "bad days" his pain level was 9 or 10 on a scale of 1-10, forcing him to bed. Provider stated in his November 19, 2002 notes, "As facet injections have not helped and [Claimant's] pain is intolerable, we will refer him to High Point Pain Clinic for a trial of lumbar epidural steroid injections" and refill and increase the dosage of some of

¹ The ALJ notes there is nothing in evidence in this proceeding, other than the IRO physician's assertion, indicating Claimant said he benefitted from the injections. Instead, the evidence shows Claimant obtained little relief from the October 2002 injections.

² Carrier offered two documents into evidence, which were admitted. Petitioner did not appear, so offered no evidence.

his medications. Claimant underwent epidural steroid injections from December 18, 2002, through March 20, 2003, which were “transiently helpful”.³

Provider had administered the bilateral facet injections to treat Claimant’s pain related to his lumbar radiculopathy. However, a May 7, 2003 EMG⁴ conducted by Mary Caire, M.D., at Diagnostic Neuroimaging, revealed no evidence of acute or chronic lumbar radiculopathy.

2. Peer reviews

a. Thomas S. Padgett, M.D.

Thomas S. Padgett, M.D., orthopedic surgeon, conducted a peer review dated August 16, 2004, in which he found Claimant to have symptomatic pseudoarthrosis⁵ at the site of his fusion, a painful condition that would support the medical necessity of office visits, referrals for occasional pain management, medication, and possibly additional surgery in the form of pseudoarthrosis repair, but not any further diagnostic testing. He said that medical treatment remains reasonable and necessary for painful pseudoarthrosis in the lumbar spine and that the documentation supported maintenance care only.

b. William F. Dossmann, M.D.

William F. Dossmann, M.D., prepared a peer review dated September 10, 2004, stating that continued facet blocks are not reasonable, since Claimant had no significant improvement following the blocks administered June 29, 2001,⁶ and in October 2002. Dr. Dossmann said Claimant had some improvement in his leg numbness after the first facet block; however, he said it was his opinion

3 William F. Dossmann, M.D., described the effects of the epidural steroid injections as “transiently helpful” in his September 10, 2003 peer review.

4 An EMG is an electromyogram, or a tracing made with an electromyograph, which converts the electrical activity associated with functioning skeletal muscle into a visual record. *Merriam-Webster’s Medical Dictionary* (1995), at 198 and 201.

5 Pseudoarthrosis is an abnormal union formed by fibrous tissue between parts of a bone that has fractured, usually spontaneously due to congenital weakness. *Merriam-Webster’s Medical Dictionary* (1994), at 565.

6 The June 29, 2001 blocks are not mentioned elsewhere in the record.

that the improvement had nothing to do with the facet block. He described the blocks as being primarily for back pain and not for nerve root compression. He also pointed out that the May 2003 EMG failed to document a radiculopathy.

3. Utilization review

On June 14, 2004, Forte Utilization Review (Forte) recommended non-authorization of the requested bilateral facet injections because the provided documentation showed that Claimant obtained little relief from the bilateral facet injections administered in October 2002. Forte concluded that given the fact that the injections failed to provide significant relief in the past, repetition of the treatment is not medically necessary.

Provider appealed Forte's June 14, 2004 review findings, stating Claimant has classic signs of lumbar facet syndrome on examination, with positive facet rocking signs with pain on extension, lateral bending, and rotation. But Forte responded that the Provider's physical exam findings are not new, citing Provider's notes from September 5, 2002, which say "facet signs, markedly positive with equal rotation and extension producing low back pain in the direction of rotation," and his notes from November 19, 2002, which say "facet signs remain markedly positive. The patient did undergo facet injections on October 2002 which did give him little relief." Forte concluded that the physical exam findings had not changed since the fall of 2002, when the first series of bilateral facet injections were ineffective, and that repeating a failed treatment is not reasonable or medically necessary.

C. ALJ's Analysis and Decision

Under the workers' compensation system, an employee who sustains a compensable injury is entitled to health care reasonably required by the nature of the injury. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LABOR CODE ANN. § 408.021. In an appeal from an IRO decision, the non-prevailing party (Carrier, in this case) has the burden of proof.

Carrier met its burden of proof in this case demonstrating by a preponderance of the evidence that the requested bilateral facet injections are not likely to cure or relieve Claimant's lower back pain, in that identical injections administered in October 2002 provided little relief. While the IRO physician states in his recommendation that Claimant asserted he obtained relief from the injections, there is nothing in the evidence before the ALJ to support that assertion. Instead, Provider's notes from follow-up visits with Claimant on November 19 and December 17, 2002, indicate Claimant obtained little relief from the injections and that on "bad days" his pain was at the 9 or 10 level, with 10 being the highest level. In addition, there is no evidence in the record that Claimant's physical condition has changed since October 2002; a change in his condition might, under certain circumstances, warrant another trial of bilateral facet injections.

The ALJ finds Provider's notes from the follow-up visits to be persuasive in finding that repeating a failed treatment, when Claimant's physical condition has not changed since the fall of 2002, is not likely to relieve the effects naturally resulting from Claimant's compensable injury. Therefore, the ALJ concludes that the requested injections are not reasonable or medically necessary, and affirms Carrier's denial of Provider's request for bilateral facet injections.

III. FINDINGS OF FACT

3. Claimant suffered a compensable injury to his back on ____, when a heavy object fell on him at work.
4. Claimant underwent a fusion at the L4-5 and L5-S1 levels of his spine in 1994, which relieved his back pain until about 2001.
5. Jacob Rosenstein, M.D. (Provider) treated Claimant's back pain with bilateral facet injections at the L3-4, L4-5, and L5-S1 levels on October 10, 2002.
6. In follow-up visits on November 19 and December 17, 2002, Claimant reported to Provider that he had obtained little relief from the bilateral facet injections and that on his "bad days," his pain level was at 9 or 10 on a scale of 10.
7. Claimant's low back condition has not changed since the fall of 2002.
8. Repeating the administration of bilateral facet injections is not likely to provide relief to Claimant for his back pain.
9. On or about June 9, 2004, Provider requested pre-authorization from Facility Insurance

Corporation (Carrier) to administer bilateral facet injections to Claimant at the L3-4, L4-5, and L5-S1 levels of the spine.

10. On June 14, 2004, Facility Insurance Corporation (Carrier) denied Provider's request.
11. On July 1, 2004, Provider requested medical dispute resolution, and the Texas Workers' Compensation Commission referred the dispute to an Independent Review Organization (IRO).
12. On July 30, 2004, the IRO physician recommended that the requested bilateral facet injections be pre-authorized.
13. On August 18, 2004, Carrier requested a hearing before the State Office of Administrative Hearings, seeking affirmation of its denial of the requested treatment.
14. The Commission issued the notice of hearing on September 8, 2004, to all parties. The notice contained information regarding the time, place, and nature of the hearing; 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.
15. SOAH ALJ Sharon Cloninger conducted the hearing in this matter on October 13, 2004. Carrier appeared, but Provider did not. The hearing concluded and the record closed that same day.

IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing, including the authority to issue a decision and order. TEX. LABOR CODE ANN. § 413.031(k).
2. All parties received proper and timely notice of the hearing. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. Carrier, as the appealing party, has the burden of proof by a preponderance of the evidence. 28 TEX. ADMIN. CODE § 148.21(h).
4. The requested bilateral facet injections are not medically reasonable or necessary for the proper treatment of Claimant. TEX. LABOR CODE ANN. §§ 401.011(19) and 408.021.
5. Carrier's appeal is granted, and Carrier's denial of the requested treatment is affirmed.

ORDER

IT IS, THEREFORE, ORDERED that Carrier's appeal is granted, and pre-authorization is denied for the bilateral facet injections requested for Claimant by Provider.

SIGNED November 1, 2004.

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