

**SOAH DOCKET NO. 453-05-2406.M2
TWCC MR NO. M2-04-1804-01**

—,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
ZURICH AMERICAN INSURANCE	§	
COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

___,¹ (Claimant) contested an independent review organization (IRO) decision, issued on behalf of the Texas Workers' Compensation Commission (Commission), concluding that a requested lumbar discogram with CT scan (discogram) was medically unnecessary. The Claimant's employer's workers' compensation insurer, Zurich American Insurance Company (Carrier), contended the discogram was unnecessary because all other possible generators of the Claimant's pain should first be ruled out before that procedure is tried and the Claimant's physician has not proposed a plan for surgery to be used in conjunction with the discogram. The Carrier also argued, because there was no evidence of any problem at any level of the Claimant's spine other than L5/S1, that other levels should not be considered. This decision authorizes a discogram only at the L4/L5 and L5/S1 levels of the Claimant's spine.

I. PROCEDURAL HISTORY

A hearing convened and closed in this case on March 9, 2005, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings, Austin, Texas. The Claimant appeared and was assisted by Commission Ombudsman Barton Levy. The Carrier appeared and was represented by Steve Tipton, Attorney. There were no objections to notice or jurisdiction.

II. DISCUSSION

A. Background

The Claimant suffered a compensable injury on ___, while unloading a truck containing plastic pipe. He slipped on a wet floor and tried to prevent himself from falling. As he did so, there was a "pop" in his lower back that felt like "a lot of needles." A roll of plastic tubing fell on him and his foot was trapped between two pallets. Originally, his foot, shoulder, and low back hurt, but he no longer has shoulder or foot pain. He left work on December 5, 2003, and has not returned.

¹ Fors privacy reasons, the Claimant's initials are used.

The Claimant underwent an epidural steroid injection (ESI) in January 2004 and a facet injection in April of the same year. The Carrier denied his request for sacroiliac (SI) joint injections.² He has continued to experience pain. He is taking several medications, including Zanaflex, Bextra, and Ultram. One place on his back is too tender to touch. He experiences pain under several circumstances, including riding in a car, lifting, and sitting for too long a time.

On June 16, 2004, the Claimant's orthopedic surgeon, James A. Guess, M.D., requested preauthorization for a discogram. The Carrier denied the request and the Claimant requested medical dispute resolution. The IRO physician recommended denial and wrote,

The records submitted do not indicate that the patient has any type of neurologic symptoms and all of his studies, which included EMG and MRI, have failed to identify a surgical lesion. The record does not indicate that any type of surgical lesion is being planned or that the result of this study has any bearing on whether or not surgery should be done. The reviewer does not find that the results of the requested discogram would add anything to this man's diagnosis.³

B. Parties' Positions

1. Claimant

Dr. Guess said in his June 16, 2004 letter that the Claimant has undergone ESI and facet injections and other conservative therapy without significant improvement. Based on that assessment, he recommended a discogram. He said the procedure is designed to initially assist in identifying the pain generator and evaluating the integrity of the disc in order to evaluate treatment options.⁴ He believes the Claimant is suffering from annular disc tears and he wants to see if the pain source is the disc itself.

The Claimant's treating doctor, David Zahaluk, M.D., wrote on December 27, 2004,⁵ that the Claimant has been treated with ESIs, facet injections,⁶ and SI joint injections.⁷ He said the Claimant has low back pain and that magnetic resonance imaging (MRI) shows degenerative disc disease and facet syndrome principally at his L5/S1 spinal level. He recommended a CT-myelogram,⁸ but agreed at the hearing with Dr. Guess' recommendation of a discogram instead.

2 Ex. 1 at 31.

3 Ex. 1 at 2.

4 Ex. 1 at 150-151, 154.

5 Ex. 1 at 155.

6 Dr. Zahaluk's reference to facet injections is in handwriting on the letter. Ex. 1 at 155.

7 As indicated above, SI joint injections were not approved by the Carrier. They were not performed. Dr. Zahaluk acknowledged that ESIs, facet injections, and SI joint injections all had a therapeutic and diagnostic component.

8 Ex. 1 at 155-156.

Dr. Zahaluk said there is some evidence of SI joint dysfunction, which is an inflammation of the sacroiliac joint. He understood that a SI joint injection was performed, but he does not know why the record does not show that. He believes there are likely multiple generators for the Claimant's pain.

Dr. Zahaluk acknowledged that Dr. Guess has not proposed any specific surgery, but said a proposal would be dependent on the discogram results.

The Claimant's orthopedic surgeon before Dr. Guess was Robert Choteau, D.O. He wrote on December 21, 2004, that the Claimant has been treated conservatively, but his pain has persisted. He said lumbar ESIs provided "some relief of symptoms," but also said "the pain pattern had progressed." On the basis of failed conservative treatment, the Claimant's pain, and degenerative disc disease shown by an MRI, he proposed a discogram to rule out occult pathology.⁹

Dr. Choteau requested an electrodiagnostic consultation, which was done by Mike Shah, M.D., on February 3, 2004. Dr. Shah noted that a December 10, 2003 MRI shows disc desiccation, a 2 mm bulge, and facet arthropathy at L5-S1, and that X-rays show facet arthropathy at L4-5 and L5-S1 bilaterally. In his recommendations, Dr. Shah said: the Claimant had some benefit from the first ESI that changed his pain pattern to a more focused pattern; he now exhibits more pain which seems to emanate from the SI joint area on the right side; he would consider doing an SI joint injection on the right side and if that did not work, doing a facet injection bilaterally; the Claimant most likely has multifactorial etiology for his pain pattern; and if all else fails, he most likely has a possible annular tear or discogenic pain from that L5-S1 disc and may need a discogram.¹⁰

In an April 28, 2004 designated-doctor medical evaluation, Columbus Floyd, Jr., M.D., concluded that the Claimant had not reached maximum medical improvement.¹¹

The Claimant pointed out that several doctors have recommended the discogram. He cited the fact that one of the doctors is an independent reviewer and the others are specialists in their field. He argued that the opinions of several doctors should carry weight.

2. Carrier

The Carrier argued the Claimant has not completed all of the tests that are a necessary precursor to a discogram, including an SI joint injection and complete sets of ESIs and facet injections. It cited Dr. Shah's records saying there was 40 to 50 percent relief in the Claimant's back pain and about 25 percent relief in his leg pain from the ESI. It pointed out there was no follow-up ESI after the initial one. It acknowledged Dr. Shah's notation that the pain actually increased after the first ESI, but maintained that could be due to reactive synovitis.¹² It contended the Claimant's pain was resolved in part by the ESI.

⁹ Ex. 1 at 153.

¹⁰ Ex. 1 at 133-136.

¹¹ Ex. 1 at 19.

¹² Dr. Zahaluk testified that reactive synovitis is an inflammation of the disc joint-lining that could be caused by the injection itself.

According to the Carrier, the record does not show any results from the facet injection other than Dr. Guess' report that the Claimant said it did not help. It pointed out that only one facet injection was done.

The Carrier stressed the fact there was no SI joint injection performed to see if the SI joint was the source of the Claimant's pain. It acknowledged denying a requested SI joint injection, but said it did so because it had insufficient information to approve the procedure, rather than because it concluded that the procedure was medically unnecessary. It cited the Claimant's failure to request reconsideration of the denial. It said a discogram should be used only when every pain source has been ruled out except discogenic disease (pain from nerves in the disc itself).

The Carrier noted that the Claimant's diagnoses changed over time.¹³

The Carrier concluded there are other reasons for denying the discogram. It argued, because the Claimant's MRI showed only mild spondylosis at the L5/S1 spinal level, there is no conceivable justification for a discogram at the L4/L5 and L3/L4 levels. Citing a June 29, 2004 peer review recommending a denial of the discogram because Dr. Guess has not indicated it will be used in surgical planning,¹⁴ the Carrier asserted a discogram is used to design or plan a surgery that has been proposed and that surgery cannot be planned unless all other sources of pain have been ruled out.

C. Analysis

The ALJ concludes the preponderant evidence supports a discogram at the Claimant's L4/L5 and L5/S1 spinal levels. Among other matters, the Carrier argued that a discogram is premature because ESIs were not fully explored, there is no indication of the result of facet injections, and SI joint injections have not been tried. The ALJ finds the Carrier's argument is against the weight of evidence.

The Carrier denied approval of the SI joint injection. The peer review which led to the denial said, "Performing procedures for relief of pain without objective evidence of abnormality has a very poor success rate. There is no documentation of study demonstrating abnormality in these joints. Request is not medically reasonable or necessary." This rationale literally says the procedure is not medically necessary and that conclusion is based on an absence of objective evidence of an abnormality, rather than stating, as argued by the Carrier, that the procedure is inadequately documented. It is conceivable that some of the Claimant's doctors agreed that the procedure was medically unnecessary and moved on to the discogram recommendation. In any case, the Carrier denied the request based on a lack of medical necessity and should not now be heard to argue that it was, in fact, medically necessary to perform the SI joint injection (as a precondition to other treatment).

¹³ Ex. 1 at 5, 8, 50, 51, and 133-136.

¹⁴ Ex. 1 at 143.

Dr. Choteau concluded on February 10, 2004, that the Claimant received "only minimal benefits" from the ESI. He also said the Claimant experienced an exacerbation of his symptoms down his right lower extremity. He recommended aborting the second and third ESIs.¹⁵ Although on February 3, 2004, Dr. Shah said the Claimant received 40 to 50 percent relief from his back pain and 25 percent from his leg pain, he also said the pain has increased, but in a more focused area. He said in another part of the same report that the Claimant was experiencing more pain.¹⁶ There was no medical evidence saying the increased pain was due to reactive synovitis.

The record also contains notes on the results of the facet injection. Dr. Choteau wrote on April 23, 2004, that the Claimant still had some pain and spasms after the injection. He said he would reevaluate the Claimant in a month and would consider a repeat injection if the pattern persisted.¹⁷ Dr. Guess said in a June 16, 2004 letter that the Claimant has undergone a facet injection and ESI without significant improvement.¹⁸ The Carrier's representative said in a June 29, 2004 letter (which denied the request for a discogram) that the Claimant continues to have low back and radicular pain despite facet injections and ESIs.¹⁹

There was no expert medical evidence that a specific surgical plan is a necessary precondition to performing a discogram. The Carrier's letter of June 26, 2004, said merely that Dr. Guess has not indicated that a discogram would be used in surgical planning. The IRO reviewer made similar comments.²⁰ Moreover, Dr. Guess' testimony shows that he has frequently used a discogram (three to five a month) during 10 years of practice to determine an appropriate treatment plan. It is reasonable to infer that an appropriate treatment plan sometimes includes surgery.

The Carrier argued there is no indication of any need for a discogram at any spinal level but L5/S1, which, it said, appears to be the site of the Claimant's pain. However, the record has many references to problems at the L4/L5 spinal level as well as L5/S1.²¹ The ALJ agrees with the Carrier that there is no indication for a discogram at the L3/L4 spinal level.

Based on the foregoing discussion, the ALJ will order the Carrier to provide a discogram. However, a discogram is not required at any spinal level other than L4/L5 and L5/S1.

III. FINDINGS OF FACT

1. The Claimant suffered a compensable injury on ____, while unloading a truck containing plastic pipe. He slipped on a wet floor and tried to prevent himself from falling. As he did so, there was a "pop" in his lower back that felt like a lot of needles.

15 Ex. 1 at 8-9.

16 Ex. 1 at 134, 136.

17 Ex. 1 at 85-86.

18 Ex. 1 at 150.

19 Ex. 1 at 143.

20 Ex. 1 at 2. Both parties said the IRO reviewer was not given all the relevant records for making a decision.

21 See for example, Ex. 1 at 6, 8, 24, 29, 50-51, 74-75, 85-86, 118, 133, and 135.

2. The Claimant left work on December 5, 2003, and has not returned.
3. The Claimant underwent an epidural steroid injection (ESI) in January 2004 and a facet injection in April of the same year.
4. The Carrier denied the Claimant's request for a sacroiliac (SI) joint injection.
5. The Claimant is taking several medications, including Zanaflex, Bextra, and Ultram. One place on his back is too tender to touch. He experiences pain under several circumstances, including riding in a car, lifting, and sitting for too long a time.
6. On June 16, 2004, the Claimant's orthopedic surgeon, James A. Guess, M.D., requested preauthorization for a lumbar discogram with CT scan (discogram).
7. The Claimant's employer's workers' compensation insurance carrier, Zurich American Insurance Company (Carrier), denied the request and the Claimant requested medical dispute resolution.
8. An independent review organization denied the requested service.
9. It is undisputed that the Claimant requested a hearing not less than 20 days after receiving notice of the independent review organization determination.
10. 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.
11. There were no objections to notice or jurisdiction.
12. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
13. The Claimant received only minimal benefits from the January 2004 ESI.
14. The Claimant did not receive significant improvement from the April 2004 facet injection.
15. The Carrier denied the Claimant's request for an SI joint injection based on its conclusion that the procedure was not medically necessary.
16. Dr. Guess has frequently used a discogram and intends to use it in the Claimant's case to determine an appropriate treatment plan.
17. A discogram at the L4/L5 and L5/S1 levels of the Claimant's spine, but not at any other spinal level, would be beneficial for determining the source of the Claimant's pain and an appropriate treatment plan.

III. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
3. The Claimant had the burden of proving that the discogram was reasonably required by the nature of the his injury. 1 TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148(h).
4. The evidence showed the discogram is reasonably required by the nature of the Claimant's injury at his L4/L5 and L5/S1 spinal levels. TEX. LABOR CODE ANN. § 408.021; 28 TAC § 134.600.

ORDER

IT IS THEREFORE ORDERED that a lumbar discogram with CT scan for the Claimant be, and the same is hereby, authorized and that Zurich American Insurance Company pay the cost of the lumbar discogram with CT scan.

IT IS ORDERED FURTHER the lumbar discogram with CT scan is not authorized for any level of the Claimant's spine other than L4/L5 and L5/S1.

SIGNED April 8, 2005.

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