

**SOAH DOCKET NO. 453-05-4447.M2  
MDR NO. M2-05-0455-01**

<b>DALLAS FIRE INSURANCE CO.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
VS.	§	OF
	§	
<b>FERNANDO AVILA, M.D.,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

The issue in this case is whether a lumbar discogram with CT scan of the Claimant's spine should be preauthorized. The Administrative Law Judge (ALJ) finds that the requested procedure should be preauthorized.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

ALJ Kerry D. Sullivan held the hearing on this matter on March 29, 2005. The Petitioner was represented by W. Jon Grove, who appeared by telephone. Respondent Fernando Avila, M.D., also appeared by telephone and represented himself. Proper notice of the hearing was provided as set out in the findings of fact and conclusions of law.

**II. BASIS FOR DECISION**

The documentary record in this proceeding consists of a relatively scant ten pages of medical records previously submitted to the IRO. Dr. Avila also testified briefly during the hearing, but there were no other witnesses.

The evidence shows that, on \_\_\_\_, the Claimant suffered a compensable injury to his lumbar spine. The Claimant continues to experience pain. His treating physician, Robert Zuniga, D.C., referred the Claimant to Dr. Avila for consultation. Dr. Avila, in turn, has requested preauthorization for a lumbar discogram with CT scan of the Claimant's spine at L3-4, L4-5, and L5-S1. The Carrier denied this request as medically unnecessary. The Carrier's physician advisor observed that the Claimant "would not be a candidate for a 3-level fusion," that discograms are "very controversial and may be misleading in localizing the pain generator," and that recent studies on discography do not support their use for either "IDET or fusion" procedures.<sup>1</sup>

The ALJ finds that the Carrier has not proved that the requested procedure is unnecessary. The MRI report in the record reflects "multilevel discal pathology involving discal herniation at each of the L3-4, L4-5 and L5-S1 Levels."<sup>2</sup> In his brief testimony, Dr. Avila stated the purpose of the requested procedure was to further identify the source of pain among the three herniated discs identified in the MRI, any or all of which could be the source of the Claimant's pain. This information would then be used to determine the appropriate treatment plan.

While the Carrier's bases for denying the requested procedures raise questions pertaining to their efficacy, the Carrier provided no detail, and the reasons for denial are not even supported by an identified physician. The ALJ finds these statements inadequate to overcome the decision of the IRO, which was supported by Dr. Avila's testimony and the MRI report.

The Carrier also argues that preauthorization should not be approved because there has been inadequate communication between the treating doctor and the referring doctor pursuant to 28 TEX

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<sup>1</sup> Carrier Ex. 1, p. 2-3.

<sup>2</sup> An EMG and nerve conduction study performed on September 11, 2003, were normal, however, with no "clear-cut" lumbar radiculopathy.

ADMIN. CODE § 180.22(d)(2) and (e)(2). The ALJ observes that the Carrier did not raise this issue as a basis for denial of preauthorization prior to the hearing. The issue, therefore, appears to be beyond the scope of this hearing.<sup>3</sup> In any event, the evidence with respect to the communication between the treating and referring doctor was unclear. In his testimony, Dr. Avila simply did not recall these communications offhand – perhaps because the Carrier had never before raised them as an issue. Under these circumstances, and in light of the fact that the burden of proof rests with the Carrier, the ALJ does not believe preauthorization should be denied based on suspected lack of communication between the treating and referring doctors.

Based on the above, the ALJ finds that the Carrier failed to demonstrate the requested lumbar discogram with CT scan is not medically necessary.

### **III. FINDINGS OF FACT**

1. The Claimant was injured on \_\_\_\_, when he suffered a compensable injury to his lumbar spine.
2. The Claimant's treating physician, Robert Zuniga, D.C., referred the Claimant to Fernando Avila, M.D., for consultation.
3. Dr. Avila has requested preauthorization for a lumbar discogram with CT scan of the Claimant's spine at L3-4, L4-5, and L5-S1.

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<sup>3</sup> See 28 Tex. Admin. Code § 134.600(f)(6)(A)(requiring the Carrier to identify the principal reasons for denial of preauthorization.) In reimbursement cases, SOAH has long held that the Carrier may not raise new bases for denial at hearing. See SOAH Docket No. 453-00-1570 (October 20, 2000).

4. Dallas Fire Insurance Company (Carrier) refused to preauthorize the request for the discogram with CT Scan on the basis that the requested procedures are not medically necessary.
5. The Medical Review Division office (MRD) of the Texas Workers' Compensation Commission found, based upon a decision issued by an independent review organization, that the requested services were medically necessary.
6. The Carrier appealed the MRD's decision.
7. Notice of the hearing was sent March 7, 2005. 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.
8. The hearing was convened on March 29, 2005, with Administrative Law Judge (ALJ) Kerry D. Sullivan presiding. The Carrier was represented by W. Jon Grove, who appeared by telephone. Respondent Fernando Avila, M.D., also appeared by telephone and represented himself. The record closed the same day.
9. The Claimant continues to experience back pain from his compensable injury.
10. An MRI of the Claimant's spine conducted on September 10, 2003, indicates multilevel discal pathology involving discal herniation at each of the L3-4, L4-5, and L5-S1 Levels.
11. Dr. Avila requests a discogram with CT Scan to further identify the source of the Claimant's pain and to assist in determining the appropriate treatment plan.
12. The Carrier failed to demonstrate that the requested discogram with CT scan is not necessary to further identify the source of the Claimant's pain and to assist in determining the appropriate treatment plan.
13. The Carrier failed to establish that the treating and referring physicians did not communicate as required by 28 TEX. ADMIN. CODE § 180.22(d)(2) and (e)(2).

#### IV. CONCLUSIONS OF LAW

1. 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(k) and TEX. GOV'T CODE ANN. Ch. 2003.
2. Carrier timely filed its request for a hearing as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. § 2001.052.
4. The Carrier has the burden of proof in this proceeding under 28 TAC § 148.21(h).
5. The Carrier has failed to show the requested lumbar discogram with CT scan should not be preauthorized.

#### ORDER

IT IS, THEREFORE, ORDERED that preauthorization for a lumbar discogram with post CT scan at the L3-4, L4-5, and L5-S1 levels of the Claimant's spine is GRANTED.

**SIGNED April 27, 2005.**

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**KERRY D. SULLIVAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**