

**DOCKET NO. 453-05-8281.M2
MRD NO. M2-05-1512-01**

—,	§	BEFORE THE STATE OFFICE
PETITIONER	§	
	§	OF
V.	§	
	§	
GLOBE INDEMNITY COMPANY,	§	ADMINISTRATIVE HEARINGS
RESPONDENT	§	

DECISION AND ORDER

Claimant filed this petition challenging the decision of an Independent Review Organization (IRO) denying preauthorization of a lumbar discogram. The IRO upheld the decision of Globe Indemnity Company (Carrier) to deny the requested procedure on the basis that it was not medically necessary. Based on the evidence presented during the hearing, the Administrative Law Judge (ALJ) finds that Claimant failed to meet his burden of proving the procedure is medically necessary.

I. NOTICE AND PROCEDURAL HISTORY

ALJ Tommy L. Broyles held the hearing on this matter on August 25, 2005. Carrier was represented by Robert F. Josey. Claimant appeared by telephone with the assistance of Juan Mireles, Ombudsman for the Texas Workers' Compensation Commission (Commission). Proper notice of the hearing was provided as set out in the findings of fact and conclusions of law.

II. DISCUSSION

The evidence reveals that Claimant suffered a compensable injury to his back on _____. He was provided with conservative care, including physical therapy and chiropractic treatment, but received little to no pain relief. Presently, Claimant complains of a constant, stabbing and aching

pain of severe intensity in his lower back. An MRI revealed central disc protrusion with internal derangement at the L5-S1 level. The requested procedure would be used to assess whether and where spinal surgery should be performed.

The only witness presented during the hearing was Claimant. He testified that he received an epidural injection and facet block but neither provided significant pain relief. He felt no improvement from the epidural injection and only a couple of weeks relief from the facet block. Claimant never stopped working and is presently working on light duty. Since 2003, he has continued to have back pain radiating down his right extremity with no improvement. Claimant testified that the pain is getting more intense.

Claimant relied on the written notes of Robert E. Urrea, M.D., for proof that a bulging disc at L5-S1 was present along with an annular tear. Claimant also noted that a Commission Hearings Examiner specifically recognized this injury in the Examiner's written decision after a compensability hearing.¹ Dr. Urrea opines in his notes that a lumbar discogram is necessary to identify the pain origin which will determine whether surgery is appropriate.²

Carrier relied on the written opinions of Charles F. Xeller, M.D., who reviewed Claimant's medical records and opined that a discogram is not indicated. After reviewing the MRI, Dr. Xeller determined that Claimant had a lumbar strain with some underlying disc degenerative changes. He stated that no radiculopathy was noted and that Claimant had no pain from flexion through extension. For these reasons, Dr. Xeller believes Claimant had pre-existing degenerative disc disease. He noted that with acute disc disruption, pain with extension would be expected. Dr. Xeller suggested that Claimant should keep his weight down and recommended home exercise and stretching programs.

¹ ___ v. *Globe Indemnity Company*, Docket No. EP-04309006-01CC-EP46 at pg. 3; included in Ex. P-1, pg. 11.

² Ex. P-1, p. 24.

III. ALJ'S DECISION

Based on a careful review of the record, the ALJ concludes that Claimant has not met his burden of showing that the requested procedure is medically necessary. This decision is based on discrepancies between Claimant's medical records and testimony; exaggerations in pain level suggested by Claimant's medical records; and Claimant's failure to prove the necessity of a discogram to determine his pain generator.

A careful review of the medical records, created by Dr. Urrea, and Claimant's testimony reveals discrepancies. Medical records from May 17, 2004, suggest an epidural injection provided positive results, while Claimant testified that he received absolutely no relief from that procedure.³ Further, medical records from March 4, 2005, state that Claimant enjoyed a 50-percent relief in back pain from the January 20, 2005 facet block.⁴ Yet, Claimant testified that he only received pain relief for two weeks. While there may be reasonable explanations for these apparent contradictions, they are not presented in the evidentiary record.

Moreover, questions are raised by medical records suggesting Claimant experienced a pain level of ten, on a scale of one to ten, while continuing to perform exercises such as the treadmill and resistive weight training.⁵ Claimant further testified that he never missed work during this same time period, except for an occasional day after a medical procedure. The ALJ does not find it reasonable for Claimant to suggest he is experiencing the worst kind of pain possible while continuing to perform these activities. Moreover, when answering a questionnaire about his pain on June 24, 2004, Claimant indicated that he could not work at all. This is contradicted by his testimony during the hearing that he has always worked.

³ Ex. P-1, p. 44.

⁴ Ex. P-1, pp. 14 and 15.

⁵ Ex. R-1, p. 127 and throughout the medical records.

Finally, Dr. Urrea suggests that the discogram is medically necessary to determine the pain generator which will provide information on whether surgery is indicated. However, in Claimant's medical records, Dr. Urrea states, "[t]here is no doubt that the patient's back pain is related to the disruption of the L5-S1 disc."⁶ Given this statement, the ALJ can not make a finding that a discogram is necessary to determine Claimant's pain generator. For these reasons, the ALJ concludes that Claimant failed to meet his burden of proving the discogram is medically necessary.

IV. FINDINGS OF FACT

1. On ____, ____ (Claimant) suffered a compensable injury to his lower back.
2. At the time of Claimant's injury, his employer had workers' compensation insurance through Globe Indemnity Company (Carrier).
3. Claimant seeks preauthorization for a discogram.
4. Carrier denied the request for preauthorization.
5. Claimant requested medical dispute resolution at the Texas Workers' Compensation Commission, which referred the matter to an Independent Review Organization (IRO).
6. The IRO found that the requested discogram should not be preauthorized.
7. Claimant timely requested a hearing before the State Office of Administrative Hearings (SOAH).
8. Notice of the SOAH hearing was sent to the parties on August 3, 2005. The notice informed the parties of the date, time, and location of the hearing, a statement of the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
9. The SOAH hearing convened and closed on August 25, 2005. Claimant and Carrier appeared and participated in the hearing.
10. Claimant's testimony regarding his ability to work is in conflict with answers he gave on a pain questionnaire.

⁶ Ex. P-1, p17.

11. Claimant has demonstrated pain exaggeration, suggesting his pain was a ten on a scale of one to ten while he was able to work.
12. Claimant's medical records have internal inconsistencies and sometimes conflict with Claimant's testimony.
13. Claimant's back pain is related to the disruption of the L5-S1 disc so a discogram was not proven medically necessary to determine the back pain generator.
14. The requested discogram was not proven to be medically necessary treatment for Claimant's compensable injury.

V. CONCLUSIONS OF LAW

1. 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. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. As the Petitioner, Claimant has the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.14(a).
4. Claimant failed to establish that the requested discogram is medically necessary treatment for Claimant's compensable injury.
5. The requested preauthorization of a discogram of the lumbar spine should be denied. TEX. LAB. CODE ANN. § 408.021.

ORDER

IT IS ORDERED that the request submitted by Claimant ___ for preauthorization of a lumbar discogram is denied.

Signed this 23rd day of September 2005.

**TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**