

KENNETH G. BERLINER, M.D.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
ACE USA/ESIS,	§	ADMINISTRATIVE HEARINGS
Respondent.	§	

DECISION AND ORDER

Kenneth G. Berliner, M.D. (Provider), challenged the decision of Ace USA/ESIS (Carrier), denying preauthorization for a lumbar discogram with CT scan. In this decision, the Administrative Law Judge (ALJ) finds that Provider did not meet his burden of showing that the requested procedure is reasonable and necessary medical care and should be preauthorized. Therefore, the ALJ does not order Carrier to authorize the requested lumbar discogram.

The hearing convened and closed on October 3, 2005, before ALJ Steven M. Rivas. Provider appeared and represented himself. Carrier appeared and was represented by Richard Hurder, attorney.

I. DISCUSSION

1. Background Facts

Claimant sustained a compensable back injury on ____. Claimant has been treated with physical therapy, epidural steroid injections, and medication for his compensable injury. On February 19, 2003, Claimant underwent an MRI examination that revealed desiccation at the L4-L5 and L5-S1 regions of Claimant's spine. Based on the results of the MRI examination, Claimant underwent back surgery, yet still complained of back pain. Claimant underwent a repeat MRI examination, which showed degenerative changes at the L4-L5 and L5-S1 regions. Based on the results of the repeat MRI examination, Provider has recommended Claimant undergo a repeat back surgery. Provider sought authorization for a discogram with CT scan in preparation for repeat back surgery.

Carrier denied preauthorization for the discogram as not medically necessary. The dispute was referred to an Independent Review Organization (IRO), which agreed with Carrier. The IRO reviewer, a board certified physician in neurosurgery, stated that discography is a procedure that is “controversial” and that no clear evidence supports its efficacy. Provider appealed the IRO decision to the State Office of Administrative Hearings.

2. Applicable Law

Pursuant to the Texas Workers’ Compensation Act (“the Act”), TEX. LAB. CODE ANN. § 408.021 *et seq.*, an employee who sustains a compensable injury is entitled to all health care that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment.

Under TEX. LAB. CODE ANN. § 401.011(19), health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.

Certain categories of health care identified by the Commission require preauthorization, which is dependant upon a prospective showing of medical necessity under §413.014 of the Act and 28 TEX. ADMIN. CODE (TAC) § 134.600. In this instance under 28 TAC §134.600(h)(7), preauthorization is required for the discogram requested by Claimant.

3. Evidence

At the hearing, Provider explained how a discogram is performed on a patient, and testified there is clear medical literature that supports the efficacy of a discogram. Provider also pointed out that Claimant has been diagnosed with post laminectomy syndrome, and that the IRO report erred in finding the discogram was not medically necessary. Provider submitted an article from *Spine*, a medical journal in support of his position.¹ The article stated that discography can “significantly improve both surgical and nonsurgical treatment outcomes.” The article also claimed “the results of discography will potentially influence the choice of surgical procedure”

¹Spine, Pain Imaging: Discography, by Kurt P. Schellhas, M.D.

Carrier primarily relied on the findings of the Intracorp Medical Department, which found the requested procedure was not medically necessary. In a report dated February 23, 2005, K. Bayles, D.O., an orthopedic surgeon, concluded after reviewing Claimant's medical records that the MRI results reflected positive disc changes in the L5-S1 region. However, Dr. Bayles stated "discography has not been proven to be superior to less invasive procedures such as MRI or CT scan." Additionally, Dr. Bayles testified that a discogram procedure carries a risk of complication.

Another report by Intercorp was issued on March 10, 2005, which also concluded that discography was not reasonable or medically necessary. The report by R. A. Shirley, M.D., found the diagnostic studies that have already been performed "demonstrated significant abnormality" in Claimant's spine. Additionally, Dr. Shirley concluded that performing a discogram at this time would not alter the treatment plan.

On re-direct, Provider expressed concern over the qualifications of Dr. Bayles, Dr. Shirley, and the IRO reviewer, by openly questioning their standing in the medical field. Provider asserted their qualifications to render such opinions were unknown. However, Provider did not present any evidence that called into question their credentials.

D. Analysis and Conclusion

The requested lumbar discogram should not be authorized at this time. Provider had the burden to prove the requested discogram is medically necessary and should be preauthorized, which he did not.

The evidence presented by Provider consisted of his testimony and an article from a medical journal. Provider repeatedly argued the three physicians who denied preauthorization did not rely on literature similar to that published in *Spine*. This point is obvious and therefore not persuasive.

The ALJ believes that a discogram is an invasive procedure that carries a risk of complication to the patient pursuant to the findings by Dr. Bayles. Provider did not dispute this characterization. The ALJ also believes a discogram will not bring any added benefit to Claimant because the diagnostic studies Claimant has already undergone have sufficiently identified Claimant's condition,

and a discogram will not alter the treatment plan, pursuant to Dr. Shirley's testimony. Provide offered no evidence to dispute this point. The IRO reviewer's statement that a discogram is a controversial study also went unaddressed by Provider. Provider's attempt to discredit the qualifications of the physicians who denied preauthorization was largely unpersuasive since he had no evidence to support his criticisms.

Provider's evidence was insufficient to prove the requested discogram is medically necessary at this time. Therefore, the ALJ finds Carrier's denial of preauthorization should be upheld in this matter.

II. FINDINGS OF FACT

1. Claimant sustained a compensable back injury on_____.
2. Claimant underwent various treatment modalities following his injury including physical therapy, epidural steroid injections, and diagnostic tests.
3. On February 19, 2003, Claimant underwent an MRI examination. Based on the results of this MRI, Claimant subsequently underwent back surgery, yet continued to complain of back pain following the surgery.
4. Claimant underwent a second MRI examination. Based on the results of the second MRI examination, Kenneth G. Berliner, M.D. (Provider), recommended Claimant undergo a repeat back surgery.
5. In anticipation of surgery, Provider sought preauthorization for a discogram from Ace USA/ESIS (Carrier), which was denied.
6. Claimant sought medical dispute resolution with the Medical Review Division of the Texas Workers' Compensation Commission (Commission), which referred this matter to an Independent Review Organization (IRO). The IRO report concurred with Carrier and denied preauthorization.
7. Provider timely requested a hearing before the State Office of Administrative Hearings (SOAH).
8. Notice of the hearing in this case was mailed to the parties on June 30, 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.
9. The hearing convened and closed on October 3, 2005, before Steven M. Rivas,

Administrative Law Judge. Provider appeared and represented himself. Carrier appeared and was represented by Richard Hurder, attorney. The hearing was adjourned and the record closed the same day.

10. Discography is a controversial and invasive procedure that carries a risk of complications to the patients who undergo the procedure.
11. Claimant has already undergone diagnostic tests that have identified his condition.
12. A discogram will not alter the treatment plan for Claimant.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* ("the Act").
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. The Provider, as Petitioner, had the burden of proof on appeal by a preponderance of the evidence under § 413.031 of the Act, and 28 TEX. ADMIN. CODE §148.21(h).
5. The requested lumbar discogram is not medically necessary for treating Claimant's compensable injury.

ORDER

IT IS, THEREFORE, ORDERED that the requested lumbar discogram not be preauthorized.

SIGNED November 3, 2005.

**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**