

**SOAH DOCKET NO. 453-05-9437.M2  
MRD NO. M2-05-2134-01**

— <b>Petitioner</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>VIA METROPOLITAN TRANSIT,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

\_\_Petitioner and Claimant, sought a hearing before the State Office of Administrative Hearings (SOAH) following an Independent Review Organization (IRO) decision. The IRO recommended denial of pre-authorization for an S2 nerve block to relieve \_\_low back pain. The IRO concluded that the nerve block was not medically necessary because there was no evidence of an S2 impingement on any imaging study or documented on any physical examination. The Administrative Law Judge (ALJ)<sup>1</sup> concludes that a left S2 nerve block is not medically necessary and that the treatment is not pre-authorized.

**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.

ALJ Tommy Broyles convened a hearing on the merits on December 6, 2005, at the offices of SOAH in Austin, Texas. \_\_\_\_, ombudsman, appeared on behalf of Claimant, and Susan Kelley, adjuster, appeared on behalf of Via Metropolitan Transit, Respondent. Bradley Burdin, D.C., Claimant’s treating doctor and expert witness, was to appear by telephone. However, on the day of the hearing, Dr. Burdin was not available by telephone when the ALJ initiated the call. The representatives of the parties completed their presentations without Dr. Burdin’s testimony, and

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<sup>1</sup> ALJ Tommy Broyles conducted both hearings. ALJ Paul D. Keeper prepared this Decision and Order after reviewing the existing record, including the tape recordings of the hearings, the evidence, and the pleadings. This procedure is authorized by the SOAH rules of procedure. 1 TEX. ADMIN. CODE §155.17(e).

Claimant made a motion for continuance to allow Dr. Burdin to be called as a witness at a later time. At the conclusion of the hearing, the parties rested. The ALJ permitted the parties to file post-hearing motions on the issue.

On December 12, 2005, Claimant filed a Motion to Allow Dr. Burdin to testify, and on the same date, Respondent filed a response in opposition. The ALJ granted the motion in Order No. 3, and in Order No. 4 rescheduled the hearing for March 2, 2006.

On March 2, 2006, Dr. Burdin was called as a witness by telephone by Claimant. Upon the conclusion of his testimony, the parties made a second round of brief closing arguments. The hearing concluded and the record closed that same day.

## **II. DISCUSSION**

On \_\_\_\_, Claimant injured her lower back while strapping a wheelchair patient into a passenger bus. Claimant had worked as a \_\_\_\_ for 27 years. Following the injury, she could not drive and had lumbar pain. She initially sought medical care through her employer's doctor and then changed to Dr. Burdin. An MRI on May 24, 2000, revealed multiple disk herniations, the largest of which was at L4-5 with displacement of the left nerve root but without neurocompressive disease. Claimant's pain has continued since the date of injury. Although Claimant has obtained some relief from a variety of types of treatment, none have provided long-term relief. At various times, Claimant's pain has been so intense that she has had to use a cane to walk.

On June 27, 2005, Dr. Burdin filed a request for preauthorization for a left S2 nerve block to be performed by David Hirsch, D.O. Respondent denied the procedure on the grounds that an S2 nerve block was medically unnecessary. On July 13, 2005, Dr. Burdin requested medical dispute resolution on behalf of Claimant, and the Texas Workers Compensation Commission (Commission or TWCC) referred the dispute to an IRO.

The IRO concurred with Respondent's position on the grounds that the record included no evidence of an S2 impingement that would necessitate a nerve block. Further, the IRO found that the Claimant's previous epidural steroid injections (ESIs) provided temporary relief at best, and that

Claimant “has returned to work full time complaining of back pain with no true radicular symptoms”.

As the petitioner, Claimant had the burden of proof and was required to prove medical necessity of the proposed procedure by a preponderance of the evidence. Claimant’s written evidence was twenty-one pages of medical notes and the IRO decision. In addition, Claimant testified and called Dr. Burdin as an expert witness. Respondent called no witnesses and submitted an undetermined number of unpaginated sheets of materials.

Section 408.021(a) of the Texas Labor Code provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment.

Thus, the question is: does the preponderance of the evidence admitted at the hearing support a conclusion that a left S2 nerve block would (1) cure or relieve the effects naturally resulting from the Claimant’s injury, (2) promote her recovery, or (3) enhance her ability to return to or retain employment?

The evidence is clear that the other treatments provided to Claimant have followed a medically conservative progression with no lasting results. Claimant started physical therapy the day after her injury and continued for four weeks with no permanent improvement. Thereafter, Claimant has had chiropractic care, hot packs, pain medication, chronic pain management, work hardening, trigger point injections, ESIs, and sacroiliac joint injections.

Although none of these treatments have provided permanent relief, Claimant testified that many have provided some relief. For example, Claimant continues to perform daily exercises to control her lumbar pain. Claimant sparingly uses pain medication and only when she is unable to obtain relief through other methods.<sup>2</sup> Claimant testified that she relies on the self-hypnosis

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<sup>2</sup> Respondent pointed out that Claimant ceased taking an anti-inflammatory medication and argued that her action may have contributed to Claimant’s claimed need for the left S2 nerve block. This argument is rejected in light of

techniques that she learned in the chronic pain management program to help her through difficult periods of increased pain. The trigger point injections provided a brief respite from Claimant's back pain-a period of two to ten weeks. The ESIs were of more help-a period of a few months-that enabled Claimant to walk without a cane.

In January 2005, Dr. Burdin and Dr. Hirsch raised with Claimant the possibility of an S2 nerve block. The goal of the procedure was to control the pain for periods longer than those gained through the use of ESIs. In the TWCC Pre-Authorization Report and Notification of June 27, 2005, the Respondent's reviewer refused to authorize the treatment on the grounds that the records were inadequate "as they do not contain any records from Dr. Hirsch or any official imaging study reports." In the TWCC Pre-Authorization Report and Notification of July 1, 2005, the reviewer stated, "The physical examination and stated diagnosis do not support the requested procedure. In addition, recent evidence based review of injections-the literature does not support the long lasting effect of the block."

At a minimum, Claimant's evidentiary hurdle was to overcome the basic objections raised by the IRO and by Respondent's reviewers: (1) present some evidence of an S2 impingement that would necessitate a nerve block, (2) present records from Dr. Hirsch or any official imaging study reports that would support the treatment, and (3) show that the medical literature supports more than a minimal effect on the pain caused by Claimant's type of injury. Claimant did not offer proof to sustain those issues. At best, Claimant proved that she had done all that she could as a patient to follow her doctors' orders to obtain relief. However, Claimant's treating physician, Dr. Burdin, did not provide the required expert testimony to support the treatment. At most, Dr. Burdin's testimony showed that since the ESIs had some benefit, the proposed left S2 nerve block might do the same. Unfortunately for Claimant, that testimony was not sufficient to support a conclusion that a left S2 nerve block would (1) cure or relieve the effects naturally resulting from the Claimant's injury, (2) promote her recovery, or (3) enhance her ability to return to or retain employment.

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Claimant's stated concerns about the growing health risks reported about the use of prescription anti-inflammatory medications.

Claimant did not sustain her burden of proof, and the issue of medical necessity was not proved by a preponderance of the evidence. Therefore, the ALJ concludes that the requested left S2 nerve block is not reasonable or medically necessary, and the Claimant's request for the treatment is not approved.

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

1. Claimant suffered a compensable injury to her back on\_\_\_, while strapping a wheelchair patient into a passenger bus.
2. Since the date of her injury, Claimant has undergone physical therapy, chiropractic care, hot packs, pain medication, chronic pain management, work hardening, trigger point injections, epidural steroid injections (ESIs), and sacroiliac joint injections to relieve her pain.
3. Although some of these treatments have had limited success in controlling her pain, none have been successful in eliminating her pain except on a temporary basis.
4. Brad Burdin, D.C., and David Hirsch, D.O., have treated Claimant's back pain with limited success.
5. Because Claimant obtained several months of temporary relief from ESIs, Drs. Burdin and Hirsch recommended that Claimant receive a left S2 nerve block to attempt to provide a longer period of pain relief.
6. No evidence was offered that Claimant's injury included an S2 impingement that would necessitate a nerve block.
7. No imaging study reports were presented that support the treatment.
8. No evidence was presented that showed that the medical literature supports the treatment as having more than a minimal effect on pain caused by Claimant's type of injury.
9. On June 27 and July 1, 2005, Via Metropolitan Transit, Respondent, denied Claimant's request for pre-authorization for a left S2 nerve block.
10. On July 13, 2005, Dr. Burdin requested medical dispute resolution on behalf of Claimant, and the Texas Workers' Compensation Commission (Commission) referred the dispute to an Independent Review Organization (IRO).
11. On August 9, 2005, the IRO recommended that the requested left S2 nerve block not be pre-authorized.
12. On August 19, 2005, Claimant requested a hearing before the State Office of Administrative Hearings (SOAH).

13. On September 14, 2005, the Commission issued the notice of hearing to all parties, including 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.
14. On December 6, 2005, and on March 2, 2006, SOAH Administrative Law Judge Tommy Broyles conducted the hearing on the merits.
15. \_\_\_\_, ombudsman, appeared on behalf of Claimant, and Susan Kelley, adjuster, appeared on behalf of Respondent.
16. The hearing concluded and the record closed on March 2, 2006.

#### **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. LAB. 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. Claimant has the burden of proof by a preponderance of the evidence. 28 TEX. ADMIN. CODE §148.14(a).
4. The requested left S2 nerve block is not medically reasonable or necessary for the proper treatment of Claimant. TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021.
5. Claimant's request for pre-authorization of the treatment is not pre-authorized.

#### **ORDER**

**IT IS, THEREFORE, ORDERED** that Claimant's request for pre-authorization is denied for a left S2 nerve block.

**SIGNED March 28, 2006.**

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**PAUL D. KEEPER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**