

<p>SOUTH TEXAS ORTHOPAEDIC AND, SPINAL SURGEON ASSOCIATES, P.A., <p style="text-align: center;">Petitioner</p> <p>V.</p> <p>HARTFORD UNDERWRITERS INSURANCE COMPANY, <p style="text-align: center;">Respondent</p> </p></p>	<p>§ § § § § § § §</p>	<p style="text-align: center;">BEFORE THE STATE OFFICE</p> <p style="text-align: center;">OF</p> <p style="text-align: center;">ADMINISTRATIVE HEARINGS</p>
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DECISION AND ORDER

South Texas Orthopaedic and Spinal Surgeon Associates, P.A., (Provider) challenges the decision of the Texas Workers' Compensation Commission's (Commission's)¹ designee, an Independent Review Organization (IRO), upholding Hartford Underwriters Insurance Company's (Carrier's) denial of preauthorization of a lumbar discogram for Claimant ____. This decision finds that the requested procedure should be preauthorized.

I. NOTICE AND PROCEDURAL HISTORY

Administrative Law Judge (ALJ) Katherine L. Smith held the hearing on this matter on September 28, 2005, and February 2, 2006. Proper notice of the hearing was provided as set out in the findings of fact and conclusions of law. The Provider was represented by John Toohey, M.D., on September 28 and Robert Joyner, M.D., on February 2. Erin Shanley, an attorney, represented the Carrier. The record closed the last day of the hearing.

II. DISCUSSION

A. Background

Claimant suffered a compensable injury in ____ when he fell four or five feet. Prior to the injury, Claimant had cervical spine surgery, including fusion. The injury increased Claimant's neck symptoms and added complaints of lower back pain. According to the IRO reviewer, who is board certified in neurological surgery, MRIs of November 10, 2004, and February 28, 2005, suggest

¹ Effective September 1, 2005, the functions of the Commission were transferred to the newly created Division of Workers's Compensation of the Texas Department of Insurance (Division).

significant pathology at the L4-5 and L5-S1 levels that are “possibly surgically correctable.” The IRO noted that Claimant was treated with physical therapy and epidural steroid injections that were not helpful. The IRO noted that Claimant’s symptoms include urinary and sexual dysfunction. The IRO stated further that nerve root compression may be the source of Claimant’s difficulties and that lumbar discography is of limited value in coming to conclusions regarding the source of nerve root difficulties. The IRO recommended a lumbar CT myelographic evaluation with flexion and extension views to help determine the type of operation that might be helpful.

B. Applicable Law

Under the workers’ compensation system, an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. § 408.021. Health care reasonably required means “health care that is clinically appropriate and considered effective for the injured employee’s injury and provided in accordance with best practices consistent with: (A) evidence-based medicine.” TEX. LAB. CODE ANN. § 401.011(22-a). Evidence-based medicine means “the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts, and treatment and practice guidelines in making decisions about the care of individual patients.” TEX. LAB. CODE ANN. § 401.011(18-a).

Certain healthcare, including a discogram, must be preauthorized before it can be provided, and preauthorization will be granted only if there is a prospective showing of medical necessity. TEX. LAB. CODE ANN. § 413.014(c)(5); 28 TEX. ADMIN. CODE § 134.600(h)(7).

C. Provider’s Position

Dr. Toohey, who is an orthopedic surgeon specializing in spine surgery, noted that Claimant clearly has abnormal discs at the L4-5 and L5-S1 levels of the spine. Because fusion is being seriously considered, Dr. Toohey is requesting the discogram to evaluate those levels, but also to see if there is pathology at the L3-4 level, to consider whether it should be included in the fusion. He

testified that if Claimant exhibits pain at the L2-3 and L3-4 levels, then fusion may not be an option. He testified that the myelogram recommended by the IRO would have limited value because it provides the same information as an MRI. He agreed with the IRO that a discogram is of limited value in determining nerve root difficulties and noted that he is not requesting the discogram to evaluate Claimant's bladder dysfunction. Ex. 1 at 28. He also admitted that discography is a controversial diagnostic tool, but he questioned the experience of the Carrier's peer reviewers and noted that as the treating doctor he has a perspective that they do not. He testified that he relies on a study issued in 1995 by the North American Spine Society (NASS) that supports the use of discography. Ex. 2 at 13-24. He is aware of contrary studies issued by Eugene Caragee, M.D., but he contends that the spine surgeons rely more on the opinions of NASS, which Dr. Joyner noted is dedicated entirely to the care of the spine.

Dr. Joyner, who is an anesthesiologist and pain management specialist and is on the Division's Approved Doctors' List, would perform the discogram. He testified that he is aware of the limitations of discography, but he stated that Claimant meets all the criteria for a discogram and is the best candidate that he has seen. He noted that none of the articles provided by the Carrier state that discography is never indicated. He noted that even Dr. Caragee wrote an article in which he indicated how it can be beneficial.² He stated that evidence-based medicine recommends use of the discograms with limitations.

D. Carrier's Position

Carrier presented the testimony of Nicolas Tsourmas, M.D., who is an orthopedic surgeon. He testified that discography, which was introduced in the 1940s, has gone in and out of favor as a diagnostic tool. He noted that more recent studies than the NASS position statement of 1995, in particular a compendium of studies published in the *New England Journal of Medicine* in 2005 by Dr. Caragee, found that discograms are a poor prognosticator of those who would benefit from fusions. Ex. 3. He noted further that discography is a risky, invasive test that results in a high false-positive rate. Citing the ACOEM³ guidelines, he stated further that only someone thought to be a

² See Ex. 7, Eugene J. Caragee, M.D. et al., *Discography: a review*, 1 THE SPINE JOURNAL 364 (2001).

³ American College of Occupational and Environmental Medicine.

surgical candidate for disc fusion or replacement might benefit from a discogram as a last resort. Ex. 5. Dr. Tsourmas noted that Claimant clearly has at least three levels of degenerative disc disease at the L3-4, L4-5, and L5-S1 levels and mild degeneration up to the L1 and L2 levels. Dr. Tsourmas testified that Claimant is a poor candidate for spine surgery and thus a poor candidate for a discogram. He concluded that discography would provide only risk and no benefit.

E. ALJ's Decision

Although Dr. Tsourmas is a credible and persuasive witness who has cast doubt on the efficacy of spinal fusion surgery and thus discography in this case and although recent peer review literature may question the efficacy of discography, the ALJ concludes that the Provider has met its burden of proof. Because conservative care has not produced results and because fusion has not been entirely ruled out by Dr. Toohey, Claimant's treating doctor, its efficacy is supportable. Dr. Toohey is proposing the discogram to help him decide whether Claimant is a surgical candidate because of concerns relating to the L3-4 level of Claimant's spine. The IRO noted that the significant pathology at the L4-5 and L5-S1 levels are "possibly surgically correctable." ACOEM supports the use of discograms to supplement information prior to surgery when fusion is a realistic consideration. Furthermore, Dr. Caragee's 2001 article in the Spine Journal appears to legitimize Dr. Toohey's use of the tool. According to Dr. Caragee, "If only one or two discs were identified as concordantly painful on discography, the surgeon would give consideration to a one- or two-level fusion. In the case of multiple painful discs on discography, however, most surgeons would refrain from attempting to treat this pathology with a multiple-level fusion given the likelihood of a poor ultimate result." Ex. 7. This case appears to be one in which additional information would be useful in assessing whether fusion truly is an option for the Claimant. Accordingly, the ALJ finds that the requested discography procedure should be preauthorized.

III. FINDINGS OF FACT

1. Claimant suffered a compensable injury in ____ when he fell four or five feet. Prior to the injury, Claimant had cervical spine surgery, including fusion. The injury increased Claimant's neck symptoms and added complaints of lower back pain
2. At the time of Claimant's injury, his employer held workers' compensation insurance coverage through Hartford Underwriters' Insurance Company (Carrier).
3. South Texas Orthopaedic and Spinal Surgeon Associates, P.A., (Provider) sought preauthorization for a lumbar discogram for Claimant.
4. The Carrier denied the request for preauthorization.
5. Provider requested medical dispute resolution at the Texas Workers' Compensation Commission (Commission), which referred the matter to an Independent Review Organization (IRO).
6. The IRO found that the requested lumbar discogram should not be preauthorized.
7. Provider requested a hearing before the State Office of Administrative Hearings (SOAH) on August 16, 2005.
8. Notice of the SOAH hearing was sent to the parties on September 14, 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 on September 28, 2005, and closed on February 2, 2006. Both parties appeared at the hearing.
10. Claimant has undergone an MRI.
11. Physical therapy and epidural steroid injections have provided Claimant with limited relief from his pain.
12. Although controversial, discography is a recognized diagnostic procedure in some instances.
13. Claimant's treating doctor, John Toohey, M.D., an orthopedic surgeon specializing in spine surgery, is considering surgery on Claimant's lumbar spine.
14. The requested discogram would provide additional objective information in determining whether Claimant is a viable candidate for lumbar spinal surgery.
15. Provider established that the requested lumbar discogram is medically necessary.

IV. CONCLUSIONS OF LAW

1. SOAH 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. §§ 402.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003, and Acts 2005, 79th Leg., ch 265, § 8.013, eff. Sept. 1, 2005.
2. Provider 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. §§2001.051 and 2001.052.
4. Provider bore the burden of proof in this matter. 28 TAC § 148.21(h) and (I).
5. The guidelines of the American College of Occupational and Environmental Medicine support the use of discograms to supplement information prior to surgery when fusion is a realistic consideration.
6. The lumbar discogram is reasonably required under TEX. LABOR CODE ANN. §§ 408.021 and 401.011(18-a) & (22-a) and should be preauthorized.

ORDER

IT IS ORDERED that the request submitted by South Texas Orthopaedic and Spinal Surgeon Associates, P.A., for preauthorization of a lumbar discogram for Claimant ____ is granted.

Signed February 23, 2006.

**KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**