MEDICAL CONTESTED CASE HEARING NO. 09079
M6-09-16008-01

# DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

## ISSUE

A benefit contested case hearing was held on January 13, 2009, to decide the following disputed issue:

> Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to a dynamic weight bearing lumbar myelogram with flexion and extension views and post CT for the compensable injury of ______________?

## PARTIES PRESENT

Claimant appeared and was represented by RB, attorney. Carrier appeared and was represented by attorney, KK.

## BACKGROUND INFORMATION

It is undisputed that Claimant sustained a compensable low back injury on ______________ while lifting heavy pipe from the ground. Claimant initially received conservative care including physical therapy and injections. In early 2006, two surgeons recommended lumbar fusion surgery at the L4-5 level. That surgery was denied through the IRO process and not pursued further. Claimant continued conservative treatment, including pain management, and ultimately saw Dr. He in October of 2007.

EMG/NCV testing in September of 2007 was consistent with acute/subacute right L4-5 radiculopathy. A November 6, 2007 MRI revealed a 3.8 mm broad-based annular bulge asymmetric to the right with effacement of the ventral sac and mild narrowing of the central canal.

Claimant's treating neurosurgeon, Dr. He, in October and November of 2007, recommended decompression and fusion at L4-5 and requested lumbar discography at that time, which was denied by the carrier. That denial was upheld by an IRO on April 25, 2008.

Following the denial of the discography, Dr. He requested L4-5 lumbar fusion surgery. The carrier denied the surgery and, on June 23, 2008, an IRO overturned that denial, citing the MRI, EMG and favorable psychological evaluation as well as the fact that exhaustive conservative treatment that had failed.

On July 11, 2008, Dr. He requested the dynamic lumbar myelogram/CT scan with weight-bearing flexion/extension views the subject of this litigation. In his chart note, Dr. He cited increasing leg

symptoms, diminished disc space height and disc protrusion on non-weight bearing supine MRI at L4-5 as the indications for the requested procedure.

The first utilization review doctor, Dr. Ha, an osteopath in family practice and occupational medicine, cited the *ODG* and denied the requested dynamic weight bearing lumbar myelogram with post myelogram CT scan. He stated that it did not appear that prior studies indicated that the patient was a surgical candidate, nor that a dynamic study was warranted.

The utilization review doctor (an orthopedic surgeon) who reviewed the request on reconsideration, Dr. A, also denied the requested treatment. He also cited the *ODG* and stated that the MRI in the instant case documented disc herniation and the EMG confirmed radiculopathy. Based on the *ODG* provision for CT myelography only in cases where an MRI is inconclusive and the fact that Claimant's MRI was conclusive for disc herniation, the reviewer denied the requested service.

An IRO reviewer and board certified orthopedic surgeon reviewed the records and upheld the adverse determinations of the utilization review doctors. The IRO denied the requested dynamic weight bearing lumbar myelogram with flexion and extension views and post CT scan citing the *ODG* and noting that Claimant already had unequivocal MRI scans and confirmatory EMG/NCV studies. The reviewer opined that the physical examination and clinical picture was compatible with the MRI scan and EMG testing. As the *ODG* recommends myelography only in those cases where the MRI scan is inconclusive, and the MRI in the instant case was not unclear and, in fact, confirmed the clinical findings and EMG testing, the IRO reviewer opined that the requested procedure was not warranted.

## DISCUSSION

**Texas Labor Code Section 408.021** 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. **Section 401.011(22-a)** defines health care reasonably required as "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; or (B) if that evidence is not available, generally accepted standards of medical practice recognized in the medical community."

"Evidence based medicine" is further defined, by **Section 401.011(18-a)** as 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.

The Division of Workers' Compensation has adopted treatment guidelines under Division **Rule 137.100**. That rule requires that health care providers provide treatment in accordance with the current edition of the *Official Disability Guidelines (ODG),* and treatment provided pursuant to those guidelines is presumed to be health care reasonably required as mandated by the above-referenced sections of the **Texas Labor Code**.

***ODG***

The initial inquiry, therefore, in any dispute regarding medical necessity, is whether the proposed

care is consistent with the *ODG*. As the utilization review and IRO doctors in the instant case have stated, the *ODG* allows for myelography if an MRI is unavailable; and, restricts the use of CT myelography to those situations where an MRI is unavailable, contraindicated or inconclusive.

The *ODG* Treatment Guidelines for the low back discuss CT myelography and myelography as follows:

> **Myelography**: Recommended as an option. Myelography OK if MRI unavailable. (Bigos, 1999)
>
> **CT & CT Myelography**: Not recommended except for indications below for CT. CT Myelography OK if MRI unavailable, contraindicated (e.g. metallic foreign body), or inconclusive. (Slebus, 1988) (Bigos, 1999) (ACR, 2000) (Airaksinen, 2006) (Chou, 2007) Magnetic resonance imaging has largely replaced computed tomography scanning in the noninvasive evaluation of patients with painful myelopathy because of superior soft tissue resolution and multiplanar capability. Invasive evaluation by means of myelography and computed tomography myelography may be supplemental when visualization of neural structures is required for surgical planning or other specific problem solving. (Seidenwurm, 2000) The new ACP/APS guideline as compared to the old AHCPR guideline is more forceful about the need to avoid specialized diagnostic imaging such as computed tomography (CT) without a clear rationale for doing so. (Shekelle, 2008)
>
> Indications for imaging – computed tomography:
>
> -Lumbar spine trauma: trauma, neurological deficit
> -Lumbar spine trauma: seat belt (chance) fracture
> -Myelopathy (neurological deficit related to the spinal cord), traumatic
> -Myelopathy, infectious disease patient
> -Evaluate pars defect not identified on plain x-rays
> -Evaluate successful fusion if plain x-rays do not confirm fusion (Laasonen, 1989)

As noted previously herein, "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 evidence-based medicine or if that evidence is not available, generally accepted standards of medical practice recognized in the medical community. Treatment provided pursuant to the *ODG* is presumed to be health care reasonably required.

The doctor who reviewed the requested procedure on reconsideration and the IRO doctor denied the requested lumbar myelogram with CT citing the relevant provisions of the *ODG*, specifically the fact that there was no showing that an MRI was unavailable, contraindicated or inconclusive; and, the fact that the MRI was actually unequivocal and consistent with Claimant's clinical symptoms and confirmed by EMG/NCV testing which revealed radiculopathy. It is incumbent on the Claimant, therefore, to provide evidence-based medicine sufficient to overcome the *ODG* and the opinions of the doctors correctly applying the *ODG.*

***Other Evidence Based Medicine***

When weighing medical evidence, the hearing officer must first determine whether the doctor giving the expert opinion is qualified to offer it, but also, the hearing officer must determine whether the opinion is relevant to the issues in the case and whether the opinion is based upon a reliable foundation. An expert's bald assurance of validity is not enough. *See* ***Black v. Food Lion, Inc.***, 171 F.3rd 308 (5th Cir. 1999); ***E.I. Du Pont De Nemours and Company, Inc. v. Robinson***, 923 S.W.2d 549 (Tex. 1995). When determining reliability, the hearing officer must consider the evidence in terms of (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of the person who applied the technique on the occasion in question. ***Kelly v. State***, 792 S.W.2d 579 (Tex. App.-Fort Worth 1990).

Claimant failed to present an evidence-based medical opinion from a competent source to overcome the IRO's decision. Dr. He is a board certified surgeon and is certainly qualified to render an opinion regarding low back surgery and treatment. The treatment proposed by Dr. He, however, is a departure from the *ODG* in that the procedure is only recommended in the absence of an MRI or in cases where an MRI is contraindicated or inconclusive. Dr. He cited the same *ODG* provisions relied on by the utilization review and IRO doctors. He also cited some of the specific studies referenced in the relevant *ODG* section. He concluded that Claimant's symptomatology was more profound in the weight-bearing position and the myelo/CT was the study of preference for Claimant's surgical planning.

The treatment proposed by Dr. He is a departure from the *ODG* in that he recommends CT myelography but fails to show how an MRI is unavailable, contraindicated or inconclusive. (Especially in light of the fact that all of the reviewers, including the Carrier's expert who testified at the hearing, agree that the MRI evidence of a L4-5 herniated disc is confirmed by the clinical notes and EMG/NCV).

Under the Act, treatment provided pursuant to the *ODG* is presumed to be health care reasonably required as mandated by the above-referenced sections of the **Texas Labor Code**. Mere citation to the *ODG*, however, does not carry the day. When both parties cite the *ODG* in support of their position, that position must be supported by sufficient evidence to justify application of the *ODG*. Dr. He's references to the *ODG* articles, without explanation as to how they apply in the instant case do not amount to evidence-based medicine. His records and conclusory opinions, without sufficient reference to the *ODG* or other evidence-based medicine justifying departure from the *ODG,* do not meet the requisite evidentiary standard required to overcome the IRO. The preponderance of the evidence is not contrary to the IRO decision and the requested dynamic weight bearing lumbar myelogram with flexion and extension views and post CT does not meet the criteria set out in the *ODG*.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

## FINDINGS OF FACT

1. The parties stipulated to the following facts:

   A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

   B. On ______________, Claimant was the employee of (Employer), when he sustained a compensable injury.

   C. The IRO determined that the requested services were not reasonable and necessary health care services for the compensable injury of ______________.

2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and name and street address of Carrier's registered agent which was admitted into evidence as Hearing Officer's Exhibit Number 2.

3. Claimant’s treating surgeon recommended a dynamic weight bearing lumbar myelogram with flexion and extension views and post CT.

4. For treatment of the low back, the *ODG* recommends CT myelography where an MRI is unavailable, contraindicated or inconclusive.

5. The IRO decision upheld the Carrier’s denial of the requested dynamic weight bearing lumbar myelogram with flexion and extension views and post CT because the Claimant’s medical records did not show that an MRI was unavailable, contraindicated or inconclusive, in fact, the MRI was conclusive and confirmed by the clinical examinations and EMG/NCV testing.

6. The requested service is not consistent with the *ODG* criteria for dynamic weight bearing lumbar myelogram with flexion and extension views and post CT.

7. The requested dynamic weight bearing lumbar myelogram with flexion and extension views and post CT is not health care reasonably required for the compensable injury of ______________.

## CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers’ Compensation, has jurisdiction to hear this case.

2. Venue was proper in the (City) Field Office.

3. The preponderance of the evidence is not contrary to the decision of IRO that a dynamic weight bearing lumbar myelogram with flexion and extension views and post CT is not health care reasonably required for the compensable injury of ______________.

## DECISION

Claimant is not entitled to a dynamic weight bearing lumbar myelogram with flexion and extension views and post CT for the compensable injury of ______________.

## ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury in accordance with Section 408.021.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL R. OLIVER, PRESIDENT**
**6210 EAST HIGHWAY 290**
**AUSTIN, TEXAS 78723**.

Signed this 13th day of January, 2009.

Erika Copeland
Hearing Officer