

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 May 27, 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 thoracic discogram at T7-8 and T8-9 and post CT scan for the compensable injury of _____?

PARTIES PRESENT

Claimant appeared and was assisted by AF, ombudsman. Carrier appeared and was represented by adjuster, JM.

BACKGROUND INFORMATION

It is undisputed that Claimant sustained an injury during the course and scope of his employment on _____, while working as a heavy equipment tow truck driver. He testified that he injured his upper back while lifting the hood of an 18-wheeler. As the result of his compensable injury, Claimant initially underwent conservative treatment including physical therapy and pain management. On September 30, 2002, Dr. R performed discectomy and interbody fusion with hemivertebrectomy at T7-8 and T8-9.

Claimant testified, and the medical records show, that following surgery he underwent physical therapy and received various injections and pain medications.

Claimant continued to have constant upper back pain and was ultimately referred to Dr. H, a spine surgeon. In July of 2008, Dr. H diagnosed Claimant with a failed thoracic fusion and ordered a bone scan and thoracic MRI. According to Dr. H, the MRI revealed multi-level thoracic spondylosis; anterior fusion at T8-9 and T9-10 with right paracentral disc protrusions at T7-8 and T8-9 resulting in insignificant central stenosis. The bone scan revealed indeterminable evidence of pseudoarthrosis at T7-8 and the radiologist suggested a thoracic CT as a more suitable study. Dr. H recommended obtaining a thoracic CT to "evaluate integrity of T7-8, T8-9 interbody fusions and to reaffirm those are the levels with interbody fusion attempts performed." Dr. H's notes show that the CT scan revealed fusions at T7-8 and T8-9 and degenerative endplate changes throughout the thoracic spine. Dr. H recommended thoracic discograms at T7-8 (which he described as the level above the fusion) and T8-9 (the cephalad level that was attempted to be fused). He stated that his concern was the possible unaddressed pain generator at T7-8 and apparent pseudoarthrosis being symptomatic at T8-9. He further stated that Claimant was a surgical candidate and ordered a psychological evaluation for the discogram and surgery.

In reviewing Dr. H's request for thoracic discograms, the first utilization review doctor, a surgeon, cited the *Official Disability Guidelines (ODG)* and stated that discograms are not recommended for treatment of the upper back. He further noted a contradiction in the diagnostic imaging and the surgical report from Dr. R. He noted that the CT scan performed in 2008 revealed a solid thoracic fusion at T7-8 and T8-9, while the MRI and bone scan pointed to different levels having been fused. The first reviewer denied the requested treatment.

The utilization review doctor who reviewed the request on reconsideration, an orthopedic and neurological surgeon, also denied the requested treatment. That reviewer also cited the *ODG* and the fact that discograms are not recommended. That reviewer also noted that the prior discectomy at the requested levels would leave no disc on which to perform a discogram. The reviewer upheld the initial denial of the requested testing.

An IRO reviewer and board certified orthopedic surgeon reviewed the records and upheld the adverse determinations of the utilization review doctors. The IRO cited the *ODG* and denied the requested discograms and post CT scan noting the confusion in the medical records regarding the levels previously fused; and, opined that the appropriate test to determine whether the fusion was solid would be a thin cut CT scan, not a discogram. The IRO upheld the Carrier's denial of the requested service.

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 in any dispute regarding medical necessity, is whether the proposed care is consistent with the *ODG*. The *ODG* discusses discography for treatment of injuries to the upper back as follows:

Not recommended. Conflicting evidence exists in this area, though some recent studies condemn its use as a preoperative indication for IDET or Fusion, and indicate that

discography may produce symptoms in control groups more than a year later, especially in those with emotional and chronic pain problems. (Carragee, 2000) (Carragee2, 2000) (Bigos, 1999) (Grubb, 2000) (Zeidman, 1995) Cervical discography has been used to assist in determining the specific level or levels causing the neck pain and, potentially, which levels to fuse; however, controversy regarding the specificity of cervical discograms has also been debated and more research is needed. (Wieser, 2007) Assessment tools such as discography lack validity and utility. (Haldeman, 2008) Although discography, especially combined with CT scanning, may be more accurate than other radiologic studies in detecting degenerative disc disease, its ability to improve surgical outcomes has yet to be proven. It is routinely used before IDET, yet only occasionally used before spinal fusion. (Cohen, 2005)

Discography is Not Recommended in ODG. See also the Low Back Chapter.

Patient selection criteria for Discography if provider & payor agree to perform anyway:

- o Neck pain of 3 or more months
- o Failure of recommended conservative treatment
- o An MRI demonstrating one or more degenerated discs as well as one or more normal appearing discs to allow for an internal control injection (injection of a normal disc to validate the procedure by a lack of a pain response to that injection)
- o Satisfactory results from psychosocial assessment (discography in subjects with emotional & chronic pain has been associated with reports of significant prolonged back pain after injection, and thus should be avoided)
- o Should be considered a candidate for surgery
- o Should be briefed on potential risks and benefits both from discography and from surgery
- o Due to high rates of positive discogram after surgery for disc herniation, this should be potential reason for non-certification

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.

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.

Both of the utilization reviewers and the orthopedic surgeon IRO reviewer denied the requested procedure citing the relevant provisions of the *ODG*, specifically the fact that discograms are not recommended; and, pointed out the added complication of the inconsistencies in the records regarding the levels previously fused and whether there were even any discs remaining at the requested levels on which to perform discography. Claimant also relied on the *ODG* in disputing the IRO opinion and claimed that Claimant met all of the selection criteria outlined in the *ODG* regarding discography for the upper back.

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*. Mere citation to the *ODG* does not carry the day. In the instant case, the IRO report is specific and concludes that discography is not recommended by the *ODG*.

The *ODG* specifically states that discograms are not recommended. Dr. H went to great lengths in his medical opinion to justify the discograms requested herein by specifically stating how Claimant met all of the selection criteria set out in the relevant section cited herein.

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. The treatment proposed by Dr. H is a departure from the *ODG* in that the *ODG* very clearly do not recommend discography for treatment of the upper back. Per the *ODG*, the selection criteria referred to by Dr. H are relevant only in those instances where the provider and payor agree to perform the procedure despite the fact that it is not recommended by the *ODG*. There is no such agreement in the instant case.

As a spine surgeon, Dr. H is certainly qualified to render an opinion regarding thoracic treatment and procedures. His opinion regarding Claimant's satisfaction of the selection criteria, however, does not constitute evidence-based medicine justifying departure from the *ODG*, nor does it 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 thoracic discogram at T7-8 and T8-9 and post CT scan 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 surgeon recommended thoracic discogram at T7-8 and T8-9 and post CT scan for treatment of Claimant's compensable thoracic spine injury.
 4. The *Official Disability Guidelines* do not recommend discography for treatment or diagnosis of upper back injuries.
 5. The IRO decision upheld the Carrier's denial of the requested thoracic discogram at T7-8 and T8-9 and post CT scan because the requested service is not recommended by the *ODG*.
 6. The requested thoracic discogram at T7-8 and T8-9 and post CT scan 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 thoracic discogram at T7-8 and T8-9 and post CT scan is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to thoracic discogram at T7-8 and T8-9 and post CT scan 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 **AMERICAN INTERSTATE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**AMERICAN INTERSTATE INSURANCE COMPANY
STEVE ROPER
1616 SOUTH CHESTNUT STREET
LUFKIN, TEXAS 75901**

Signed this 28th day of May, 2009.

Erika Copeland
Hearing Officer