

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.

ISSUES

A contested case hearing was held on August 31, 2009 to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the IRO that the claimant is not entitled to a low pressure lumbar discogram at L2-L3 for the compensable injury of _____?

PARTIES PRESENT

Claimant appeared and was assisted by ombudsman LD. Respondent/Carrier appeared and was represented by BV, attorney. In attendance as a witness on behalf of the petitioner was Dr. B, provider.

BACKGROUND INFORMATION

Claimant sustained a compensable injury to his back and right arm on _____, while unloading furniture. Diagnoses include degenerative disc disease at L2-L3 associated with a bulging disc, lumbar spine strain, and right wrist sprain. Claimant has received conservative treatment including physical therapy, an ESI injection and medications. He has been treating with Dr. B since January 2005 who recommended a lumbar discogram at L2-L3 for pre-operative evaluation. An MRI dated October 18, 2004 indicates that the claimant has a disc bulge at L2-L3. In October 2007 a psychosocial assessment was performed, verifying Claimant's fit mental status. Of significance is that in May 2006 an Independent Review Organization's (IRO) decision denied the treating doctor's request for a discogram at L2-L3, and in July 2008 surgery at L2-L3 was denied by another IRO physician. On January 28, 2009 a benefit dispute agreement (DWC 24) was signed wherein the parties agreed that an anterior and posterior lumbar discectomy and fusion at L2-3 is not medically necessary. Presently, the treating doctor's request for the discogram at L2-L3 was denied twice by the carrier's utilization review agents and their denial was upheld by the IRO.

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 evidence based medicine, if that evidence is not available, generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent

with evidence based medicine if that evidence is available. Evidence based medicine is further defined, by Section 401.011(18a) to be 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 accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines under Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the *Official Disability Guidelines* (ODG), and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308(t), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

With regard to lumbar discogram, the ODG provides as follows:

"Discography is Not Recommended in ODG.

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

- o Back pain of at least 3 months duration
- o Failure of recommended conservative treatment including active physical therapy
- 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 detailed psychosocial assessment (discography in subjects with emotional and chronic pain problems has been linked to reports of significant back pain for prolonged periods after injection, and therefore should be avoided)
- o Intended as a screen for surgery, i.e., the surgeon feels that lumbar spine fusion is appropriate but is looking for this to determine if it is not indicated (although discography is not highly predictive) (Carragee, 2006) NOTE: In a situation where the selection criteria and other surgical indications for fusion are conditionally met, discography can be considered in preparation for the surgical procedure. However, all of the qualifying conditions must be met prior to proceeding to discography as discography should be viewed as a non-diagnostic but confirmatory study for selecting operative levels for the proposed surgical procedure. Discography should not be ordered for a patient who does not meet surgical criteria.
- o Briefed on potential risks and benefits from discography and surgery
- o Single level testing (with control) (Colorado, 2001)
- o Due to high rates of positive discogram after surgery for lumbar disc herniation, this should be potential reason for non-certification"

The ODG does not recommend discography and in the present case the parties did not agree to perform the procedure anyway. Thus, Petitioner must show by a preponderance of evidence based medicine that the ODG is not applicable to this case because it does not address the medical condition at issue. Although the treating doctor did provide his expert opinion concerning why he felt that the claimant is entitled to a lumbar discogram, he did not offer sufficient evidence based medicine to overcome the IRO determination. Claimant does not meet the requirements of having all the surgical indications prior to the performance of discography. The preponderance of the evidence is not contrary to the decision of the IRO that a lumbar discogram at L2-L3 was not health care reasonably required for the compensable injury of _____.

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. The Texas Department of Insurance, Division of Workers' Compensation has jurisdiction in this matter.
 - B. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - C. On _____, Claimant was the employee of (Employer).
 - D. Claimant sustained a compensable injury on _____.
 - E. The Independent Review Organization determined that the claimant should not have a low pressure lumbar discogram at L2-L3.
2. Carrier delivered to Claimant and Provider a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. On January 28, 2009 a benefit dispute agreement was signed agreeing that an anterior and posterior lumbar discectomy and fusion at L2-3 is not medically necessary.
4. A low pressure lumbar discogram at L2-L3 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 is proper in the (City) Field Office.

3. The preponderance of the evidence is not contrary to the decision of the IRO that a low pressure lumbar discogram at L2-L3 is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to a low pressure lumbar discogram at L2-L3 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 §408.021.

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

**PRENTICE-HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TX 78701**

Signed this 31st day of August, 2009.

Judy L. Ney
Hearing Officer