

**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 contested case hearing was held on December 16, 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 discogram for the compensable injury of \_\_\_\_\_?

**PARTIES PRESENT**

Petitioner/Claimant appeared and was assisted by JT, ombudsman.  
Respondent/Carrier was represented by GP, adjuster.

**BACKGROUND INFORMATION**

Claimant's doctor has recommended a discogram for Claimant's low back pain. Since being injured on \_\_\_\_\_, Claimant's pain has persisted even though he received medications, including epidural steroid injections. A magnetic resonance imaging showed degenerative disc disease at L4-5 and L5-S1.

Two utilization reviewers denied the request for the discogram. An IRO reviewer, an M.D. with certification as an orthopedic surgeon and experience in evaluation and treating patients who have spinal problems, upheld the adverse determination. The IRO reviewer relied on the Official Disability Guidelines (ODG) which does not recommend discograms.

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. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) 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 or, if evidence based medicine is not available, then 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 in Texas Labor Code 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. The Commissioner of the Division of Workers' compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the

commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the 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 care 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."

The ODG provides the following for discography on the low back:

Not recommended. In the past, discography has been used as part of the pre-operative evaluation of patients for consideration of surgical intervention for lower back pain. However, the conclusions of recent, high quality studies on discography have significantly questioned the use of discography results as a preoperative indication for either IDET or spinal fusion. These studies have suggested that reproduction of the patient's specific back complaints on injection of one or more discs (concordance of symptom) is of limited diagnostic value.

Claimant relied on the following provision from the ODG:

**Discography is Not Recommended in ODG.**

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

- °Back pain of at least 3 months duration
- °Failure of recommended conservative treatment including active physical therapy
- °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)
- °Satisfactory results from detailed psychosocial assessment (discography in subjects with emotional and chronic pain problems has been linked to report of significant back pain for prolonged periods after injection, and therefore should be avoided)
- °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.

°Briefed on potential risks and benefits from discography and surgery

°Single level testing (with control) (Colorado, 2001)

°Due to high rates of positive discogram after surgery for lumbar disc herniation, this should be potential reason for non-certification

Claimant did not present evidence that Carrier, the payor, has agreed that the discography should be performed.

Claimant presented summaries of several articles on discography but the evidence did not show that any of the articles as summarized are evidence based medicine.

Even though all of the evidence 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, who was the employee of (Employer), sustained a compensable injury.
  - C. The IRO determined that the requested service is not a reasonable and necessary health care service for the compensable injury of \_\_\_\_\_.
  - D. Dr. T requested the discogram at L5-S1.
2. Carrier delivered to Claimant 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. The ODG does list a selection criteria for discography if both the provider and payor agree on having a discogram.
4. The payor, Carrier, has not agreed for Claimant to have a discogram.
5. A discogram 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 discogram is not health care reasonably required for the compensable injury of \_\_\_\_\_.

### **DECISION**

Claimant is not entitled to a discogram 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 **COMMERCE & INDUSTRY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
701 BRAZOS STREET SUITE 1050  
AUSTIN, TEXAS 78701-3232**

Signed this 4th day of January, 2010.

CAROLYN F. MOORE  
Hearing Officer