MEDICAL CONTESTED CASE HEARING NO. 10172
M6-09-21388-01

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.

ISSUES

A contested case hearing was held on April 26, 2010 to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization that the Claimant is not entitled to a low pressure discogram at the L3-L4 and L4-L5 levels with control at L2-L3 and post CT Scan for the compensable injury of _____?

PARTIES PRESENT

Claimant appeared and was assisted by JO, ombudsman. Petitioner/Provider Dr. B appeared without representation. Respondent/Carrier appeared and was represented by DC.

BACKGROUND INFORMATION

Claimant, a concrete finisher, was injured in the course and scope of his employment on _____. Claimant was working on a scaffold when it broke; he fell and was crushed between the scaffold and a machine. Claimant sustained injuries to his lumbar spine, right knee, right shoulder, right ankle, and a right pelvic fracture. As it relates to the lumbar spine, Claimant received physical therapy, epidural steroid injections, and medications. An MRI of the lumbar spine revealed disc protrusions at L2-L3, L3-L4, and L4-L5. Dr. P, orthopedic surgeon, performed a lumbar laminectomy at L4-L5 and L5-S1 on September 8, 2008. Dr. P moved to (State) following Claimant's surgery. Thereafter, Claimant was referred to Dr. Dr. B for follow up care for his lumbar spine as well as his other orthopedic conditions. Dr. B initially examined Claimant on October 28, 2008. During the initial examination, Claimant complained of back pain with radiation down the right leg. Dr. B's physical examination indicated a negative straight leg raise on the right with diminished sensation across the entire right foot. Dr. B diagnosed Claimant with a failed laminectomy of the lumbar spine. He recommended physical therapy and further diagnostic work up. Claimant underwent an EMG on January 5, 2009 that revealed evidence of an acute right L5-S1 radiculopathy.

Based on the results of the EMG and the MRI, Dr. B recommended a fusion surgery on March 18, 2009. Dr. B began the pre-operative work up for a fusion surgery by sending Claimant for a psychological evaluation and requesting a discogram. In his May 21, 2009 medical report, Dr. B indicated that he was recommending a lumbar discogram with post CT Scan to aid in his determination regarding fusion surgery. Dr. B stated that Claimant met all of the criteria found in the Official Disability Guides (ODG) for a fusion and the discogram would determined which level of the lumbar spine was responsible for Claimant's pain. Dr. B also stated in his May 21, 2009 report that the failure of another physician to perform a discogram has previously resulted

in sanctions by the Texas Medical Board and he wanted to maintain his license in the State of Texas. A copy of a 2007 sanction found in the Texas Medical Board Bulletin was placed into evidence.

After Dr. B requested pre-authorization for the discogram, two utilization reviews were conducted. Both utilization review agents (URA) denied the request for a discogram. The first URA dated June 16, 2009 denied the request because Dr. B did not reference the Carragee studies that are cited by the Official Disability Guides (ODG) and because Claimant does not have any instability or fracture that would warrant a fusion. The second URA dated July 8, 2009 denied the request because the ODG does not support the test, the test is subjective, and a psychological assessment was needed. (Of note, a psychological assessment was performed prior to the initial request for pre-authorization of the discogram.) Dr. B appealed the Carrier's decision to an Independent Review Organization (IRO). The IRO, an orthopedic surgeon, upheld the Carrier's denial and Dr. B appealed the decision of the IRO to a Medical Contested Case Hearing.

The Independent Review Organization (IRO) provided the following analysis and explanation of its decision:

> "As noted in the Division mandated Official Disability Guidelines discography is not recommended. Discography may be justified if the decision has already been made to do a spinal fusion, and a negative discogram could rule out the need for fusion (but a positive discogram in itself would not allow fusion). Thus, while there might be a need for discography after the determination that there is a need for lumbar fusion, as pointed out by Dr. B, the ODG goes on to note 'Discography may be supported if the decision has already been made to do a spinal fusion, and a negative discogram could rule out the need for fusion on that disc (but a positive discogram in itself would not justify fusion). Discography may help distinguish asymptomatic discs among morphologically abnormal discs in patients without psychological issues.' However, the level of disc disease has been objectified with the objective studies already completed."
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> "Relative to the assertion that his license to practice medicine might be in jeopardy, please note that the event listed by the requesting provider was not adjudicated until 2007 and the actual event occurred years prior. Subsequent to that time, the standards of practice have changed and the indications for discography have been altered. This study will not advance the diagnosis or alter the treatment plan. Again Dr. B feels that a lumbar fusion procedure is needed in this case and that the only issue preventing this surgery is the lack of a discogram. Dr. B outlines that this study is not a diagnostic one; rather this study is a pre-operative planning event. There is no clear indication for this assessment, as the requirements for the subsequent procedure a lumbar fusion in this workers' compensation patient have not been met."

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. 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 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 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 is 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 discography, the ODG provides as follows:

> 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 symptoms) is of limited diagnostic value. (Pain production was found to be common in non-back pain patients, pain reproduction was found to be inaccurate in many patients with chronic back pain and abnormal psychosocial testing, and in this latter patient type, the test itself was sometimes found to produce significant symptoms in non-back pain controls more than a year after testing.) Also, the findings of discography have not been shown to consistently correlate well with the finding of a High Intensity Zone (HIZ) on MRI. Discography may be justified if the decision has already been made to do a spinal fusion, and a negative discogram could rule out the need for fusion (but a positive discogram in itself would not allow fusion). (Carragee-*Spine*, 2000) (Carragee2-*Spine*, 2000) (Carragee3-*Spine*, 2000) (Carragee4-*Spine*, 2000) (Bigos, 1999) (ACR, 2000) (Resnick, 2002) (Madan, 2002) (Carragee-*Spine*, 2004) (Carragee2, 2004) (Maghout-Juratli, 2006) (Pneumaticos, 2006) (Airaksinen, 2006) (Manchikanti, 2009) Discography may be supported if the

decision has already been made to do a spinal fusion, and a negative discogram could rule out the need for fusion on that disc (but a positive discogram in itself would not justify fusion). Discography may help distinguish asymptomatic discs among morphologically abnormal discs in patients without psychosocial issues. Precise prospective categorization of discographic diagnoses may predict outcomes from treatment, surgical or otherwise. (Derby, 2005) (Derby2, 2005) (Derby, 1999) Positive discography was not highly predictive in identifying outcomes from spinal fusion. A recent study found only a 27% success from spinal fusion in patients with low back pain and a positive single-level low-pressure provocative discogram, versus a 72% success in patients having a well-accepted single-level lumbar pathology of unstable spondylolisthesis. (Carragee, 2006) The prevalence of positive discogram may be increased in subjects with chronic low back pain who have had prior surgery at the level tested for lumbar disc herniation. (Heggeness, 1997) Invasive diagnostics such as provocative discography have not been proven to be accurate for diagnosing various spinal conditions, and their ability to effectively guide therapeutic choices and improve ultimate patient outcomes is uncertain. (Chou, 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) Provocative discography is not recommended because its diagnostic accuracy remains uncertain, false-positives can occur in persons without low back pain, and its use has not been shown to improve clinical outcomes. (Chou2, 2009) This recent RCT concluded that, compared with discography, injection of a small amount of bupivacaine into the painful disc was a better tool for the diagnosis of discogenic LBP. (Ohtori, 2009) Discography may cause disc degeneration. Even modern discography techniques using small gauge needle and limited pressurization resulted in accelerated disc degeneration (35% in the discography group compared to 14% in the control group), disc herniation, loss of disc height and signal and the development of reactive endplate changes compared to match-controls. These finding are of concern for several reasons. Discography as a diagnostic test is controversial and in view of these findings the utility of this test should be reviewed. Furthermore, discography in current practice will often include injecting discs with a low probability of being symptomatic in an effort to validate other disc injections, a so-called control disc. Although this strategy has never been confirmed to increase test validity or utility, injecting normal discs even with small gauge needles appears to increase the rate of degeneration in these discs over time. The phenomenon of accelerated adjacent segment degeneration adjacent to fusion levels may be, in part, explained by previous disc puncture if discography was used in segments adjacent to the fusion. Similarly, intradiscal therapeutic strategies (injecting steroids, sclerosing agents, growth factors, etc.) have been proposed as a method to treat, arrest or prevent symptomatic disc disease. This study suggests that the injection procedure itself is not completely innocuous and a recalculation of these demonstrated risks versus hypothetical benefits should be considered. (Carragee, 2009) Discography involves the injection of a water-soluble imaging material directly into the nucleus pulposus of the disc. Information is then recorded about the pressure in the disc at the initiation and completion of injection, about the amount of dye accepted, about

the configuration and distribution of the dye in the disc, about the quality and intensity of the patient's pain experience and about the pressure at which that pain experience is produced. Both routine x-ray imaging during the injection and post-injection CT examination of the injected discs are usually performed as part of the study. There are two diagnostic objectives: (1) to evaluate radiographically the extent of disc damage on discogram and (2) to characterize the pain response (if any) on disc injection to see if it compares with the typical pain symptoms the patient has been experiencing. Criteria exist to grade the degree of disc degeneration from none (normal disc) to severe. A symptomatic degenerative disc is considered one that disperses injected contrast in an abnormal, degenerative pattern, extending to the outer margins of the annulus and at the same time reproduces the patient's lower back complaints (concordance) at a low injection pressure. Discography is not a sensitive test for radiculopathy and has no role in its confirmation. It is, rather, a confirmatory test in the workup of axial back pain and its validity is intimately tied to its indications and performance. As stated, it is the end of a diagnostic workup in a patient who has failed all reasonable conservative care and remains highly symptomatic. Its validity is enhanced (and only achieves potential meaningfulness) in the context of an MRI showing both dark discs and bright, normal discs -- both of which need testing as an internal validity measure. And the discogram needs to be performed according to contemporary diagnostic criteria -- namely, a positive response should be low pressure, concordant at equal to or greater than a VAS of 7/10 and demonstrate degenerative changes (dark disc) on MRI and the discogram with negative findings of at least one normal disc on MRI and discogram. See also Functional anesthetic discography (FAD). **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

To overcome the IRO's decision, Dr. Dr. B provided his expert medical testimony. During his testimony, Dr. B relied on several medical journal articles to support the medical necessity of the discogram, including four articles cited by the ODG. Specifically, Dr. B referenced (Manchikanti, 2009), (Derby, 2005), (Pneumaticos, 2006), and (Ohtori, 2009). Although Dr. B provided expert testimony and evidence based medicine to support the use of discography in certain circumstances, his testimony and the medical records presented do not establish the medical necessity of discography for this claimant. Dr. B also testified that in Claimant's case it was reasonable to deviate from the guidance found in the ODG, but he did not explain why a deviation was necessary in this case. The Claimant and Provider have not shown by a preponderance of evidence-based medicine that the requested lumbar discogram with post CT Scan is health care reasonably required for the compensable injury.

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).

   C. Claimant sustained a compensable injury on _____.

   D. The Independent Review Organization determined that Claimant should not have a lumbar discogram.

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. A low pressure discogram at the L3-L4 and L4-L5 levels with control at L2-L3 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 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 discogram at the L3-L4 and L4-L5 levels with control at L2-L3 and post CT Scan is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to a low pressure discogram at the L3-L4 and L4-L5 levels with control at L2-L3 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 §408.021.

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

WILLIAM S. MACINTYRE, IV
12222 MERIT DRIVE, #1660
DALLAS, TEXAS 75251-3212

Signed this 4th day of May, 2010.

Jacquelyn Coleman
Hearing Officer