

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 February 10, 2009 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the IRO that the claimant is entitled to a lumbar discogram at L5-S1 for the compensable injury of _____?

Although notice of the hearing was provided to Respondent/Provider at his address of record, Respondent/Provider failed to appear at the hearing. A letter was sent to Respondent/Provider subsequent to the hearing advising him that the hearing record was opened and evidence taken in the case. Respondent/Provider was further advised that he must contact the Division within 10 days of the date of the letter to request that the hearing be reconvened to allow him to show "good cause" for failing to attend the hearing and to present evidence regarding the disputed issue. To date, Respondent/Provider has not responded to the Division's letter. Claimant elected not to participate in this proceeding.

PARTIES PRESENT

Petitioner/Carrier appeared and was represented by Mr. HDP, attorney at law. Respondent/Provider was not present at the hearing nor was he represented by legal counsel.

BACKGROUND INFORMATION

It was undisputed that Claimant sustained a compensable injury on _____ while employed by (Employer)

Other credible evidence showed the compensable injury included injury to Claimant's lumbar spine for which Claimant underwent a lumbar laminectomy and discectomy at the L5-S1 spinal level in June 2001. According to the records from Dr. RF, Claimant's treating doctor, Claimant initially had complete relief of her left leg pain and partial relief of her back pain. However, Claimant has had recurrent lower back and left leg pain with numbness and tingling in her left foot during the past three or four years. Dr. RF ordered an MRI of Claimant's lumbar spine. The MRI results revealed no abnormality at the T12-L1, L1-L2, L2-L3, L3-L4 or L4-L5 spinal levels; but the MRI did show disc degeneration at L5-S1. Dr. RF has since requested a pain provocative discogram to determine with certainty whether the L5-S1 disc space is the source of Claimant's lower back and left lower extremity pain. Dr. RF noted in his narrative report of July 15, 2008 that Claimant has had physical therapy in the past, but it was not of great benefit to her. Dr. RF further opined that it will be worthwhile repeating physical therapy with an emphasis on core truncal strengthening.

Carrier denied the recommended lumbar discography at L5-S1. The denial has been reviewed by an independent review organization (IRO), which has overturned Carrier's denial. In its written determination, the IRO reviewer, reasoned:

A discogram would be very informative to make sure that the level above the proposed disc fusion level is not symptomatic and contributing to his (sic) axial low back pain. Therefore, the discogram and the level above would serve as a good control and would be very good information prior to consideration of lumbar spine fusion in this patient.

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 qualified 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.

Regarding discography, the *Official Disability Guidelines & Treatment Guidelines (ODG)* provides, in pertinent part:

Discography. 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. . . .

While not recommended above, if a decision is made to use discography anyway, the following criteria should apply:

- Back pain of at least 3 months duration
- Failure of recommended conservative treatment
- 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 pain response to that injection)
- 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)
- Intended as a screen for surgery, i.e., the surgeon feels that lumbar fusion is not highly predictive However, all of the qualifying conditions

must be met prior to proceeding with 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

Carrier presented the expert testimony of Dr. EB, a board-certified neurosurgeon licensed to practice medicine by the Texas Medical Board. Dr. EB testified that he has reviewed Claimant's medical records, the IRO decision and the applicable provisions of the *ODG*, as cited above. According to Dr. EB, applying the foregoing *ODG* criteria to the facts of the case at hand, all of the criteria have not been met. As Dr. EB testified, the evidence presented does not indicate Claimant has had a psychosocial assessment nor has she had any physical therapy or other conservative treatment, other than medication (e.g. OxyContin and methadone), since developing recurrent pain in her lower back and symptoms in her left lower extremity. Dr. EB has opined that, if performed, the discogram would be positive due to Claimant's prior bilateral discectomy at L5-S1. Citing that portion of the *ODG* that referenced a recent study that indicated "only a 27% success from spinal fusion in patients with low back pain and a positive single-level low-pressure provocative discogram," Dr. EB is of the opinion that a spinal fusion based on a positive discogram for this Claimant is not likely to be successful. This is contrary to the opinion of Dr. RF that the discogram "will establish with certainty the source of [Claimant's] pain." Dr. EB testified further that there is no medical evidence to show Claimant meets the criteria required by the *ODG* to proceed with a fusion surgery to even justify performing a discogram.

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. On _____, the employer had workers' compensation insurance coverage with Texas Mutual Insurance Company.
2. Carrier delivered to 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. The recommended lumbar discogram at L5-S1 is not health care reasonably required for the _____ compensable injury.

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 contrary to the decision of the IRO that lumbar discogram at L5-S1 is health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to lumbar discogram at L5-S1 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 **TEXAS MUTUAL INSURANCE COMPANY**; and the name and address of its registered agent for service of process is:

**RUSSELL OLIVER, PRESIDENT
6210 EAST HWY. 290
AUSTIN, TEXAS 78723**

Signed this 30th day of April 2009,

Sandra Weber Fullerton,
Hearing Officer