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 opened on April 9, 2009 with the record closing on July 2, 2009 to decide the following disputed issue:

> Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that the claimant is entitled to a lumbar discogram (at levels L2-3 (control level), L3-4 and L4-5) for the compensable injury of _____?

PARTIES PRESENT

On April 9, 2009, the Claimant did not appear. DB, ombudsman, was present to assist the Claimant. Petitioner/Carrier appeared and was represented by DP, attorney. Respondent/Provider, Dr. KB, appeared by telephone as a witness in this matter.

After the April 9, 2009 session of the hearing, the Claimant was sent a letter by the undersigned allowing him an opportunity to present good cause for his absence and evidence on the disputed issue. The Claimant timely responded to the letter and the hearing was re-set to July 2, 2009.

On July 2, 2009, the Claimant appeared and was assisted by Ms. B. Petitioner/Carrier appeared and was represented by Mr. P. Respondent/Provider, Dr. B, did not appear since he completed his testimony on April 9, 2009.

BACKGROUND INFORMATION

The Claimant was injured on _____ when a hydraulic iron cylinder weighing approximately 100 pounds tipped over and struck his back, causing immediate pain. The Claimant, who testified that he had no prior history of low back problems, has undergone conservative treatment for his injuries. He had at least one steroid injection, but it significantly increased his blood sugar and he has been apprehensive about receiving additional injections. The Claimant underwent a lumbar MRI on February 8, 2007 which showed, among other things, degenerative disc disease and facet arthritis at levels L2-3, L3-4 and L4-5, and minimal L4-5 spondylolisthesis with more compression of the thecal sac on the left side at this level. A post-myelogram CT scan was performed upon the Claimant on April 23, 2007 showing, among other things, minimal L5-6 spondylolisthesis with osteophytes/bulging disc as well as facet arthritis causing compression of the thecal sac on the left side. The Claimant began treatment with Dr. B, who board certified in orthopedic surgery, on April 17, 2008, and Dr. B noted that the Claimant had constant back pain and pain into both legs, left greater than right. On April 24, 2008, the Claimant underwent a mental health evaluation, which concluded that the Claimant could benefit from individual psychotherapy. Dr. B obtained flexion/extension x-rays of the Claimant's

lumbar spine which showed instability at L4-5. On July 1, 2008, Dr. B noted that the Claimant will need a stabilization procedure for his lumbar spine, but he wanted a preoperative lumbar discogram for purposes of excluding the L3-4 level given that the Claimant's MRI showed some bulging at that level. On July 10, 2008, Dr. B requested preauthorization for a lumbar discogram, and this request was denied twice by the carrier's utilization review agents. The Carrier's denials were overturned by the IRO.

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. The initial inquiry, therefore, in any dispute regarding medical necessity, is whether the proposed care is consistent with the ODG.

With regard to lumbar discogram, 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) 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) 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

In overturning the Carrier's denials, the IRO, who is a board certified orthopedic surgeon, gave the following as the basis for the decision:

> The patient's source of axial and leg pain have not been thoroughly evaluated. The Reviewer's medical assessment is that a discogram prior to consideration of surgical management is medically necessary. As stated above, the patient has axial low back pain and bilateral leg pain despite evidence of instability at L5-L6. Surgery is indicated and the surgeon is trying to better ascertain the pain generator.

See Hearing Officer Exhibit No. 3, p. 5; Claimant Exhibit No. 19, p.4; Carrier Exhibit C, p. 5. The IRO's report states that in reaching this decision, the IRO relied upon the ODG and medical judgment, clinical experience and expertise in accordance with accepted medical standards. The ODG, however, does not recommend that lumbar discograms be performed, and the parties have not agreed that the procedure shall be performed. Carrier presented the testimony of Dr. EB, who is a board certified neurosurgeon, whose opinion is that discograms, which are not recommended by the ODG, are unreliable. The ODG has criteria that are to be met if the parties agree that a lumbar discogram is going to be done despite the fact that the ODG does not recommend

performing such tests, and Dr. EB testified the Claimant does not meet all of those criteria. Both Dr. B and Dr. EB agreed in their testimony that the Claimant would benefit from a fusion surgery at level L4-5, but Dr. EB is of the opinion that since the Claimant's MRI shows degenerated discs at all three levels of the Claimant's spine in question, there is no normal level to use as a control in doing the discogram. Dr. B, on the other hand, testified that Dr. EB's opinion is not supported by the evidence, and he further opined that failing to perform a preoperative discogram is below the standard of care in the community.

After a review of the entire record, it is determined that the IRO decision is not consistent with the ODG and is not supported by evidence-based medicine. The Petitioner met its burden to show that the IRO decision is contrary to the preponderance of the evidence-based medical evidence. Accordingly, the Claimant is not entitled to the requested lumbar discogram since it is 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. 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 _____, Employer had workers' compensation insurance coverage with Texas Mutual Insurance Co., Carrier.

   D. On _____, Claimant sustained a compensable lumbar injury while in the course and scope of his employment with (Employer).

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 lumbar 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 contrary to the decision of the IRO that a lumbar discogram is health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to a lumbar discogram for the compensable injury of _____.

ORDER

Carrier is not liable for the benefits at issue in this hearing. The 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 **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, TX 78723

Signed this 14th day of July, 2009.

Patrice Fleming-Squirewell
Hearing Officer