APPEAL NO. 081674
FILED JANUARY 16, 2009

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on October 10, 2008. The hearing officer resolved the disputed issue by deciding that the preponderance of the evidence is contrary to the decision of the Independent Review Organization (IRO) that the lumbar decompression at L5-S1 with fusion "is not health care reasonably required for the compensable injury of _____." The appellant (carrier) appealed, arguing that the evidence does not support the hearing officer's decision. The carrier also contends that the hearing officer failed to weigh the evidence based upon evidence-based medicine standards. The appeal file does not contain a response from the respondent (claimant).

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable spinal injury on _____, and that the IRO determined that the claimant should not have spinal surgery.

The screening criteria or other clinical basis used by the IRO to make the decision was identified as the Official Disability Guidelines-Treatment in Workers' Comp published by Work Loss Data Institute (ODG). In evidence is a section of the ODG, Procedure Summary for spinal fusion which specifies patient selection criteria, clinical criteria, or other treatment plan that should be applied or considered along with a summary of supporting medical evidence.

The IRO decision by an orthopedic surgeon dated July 9, 2008, upheld the carrier's denial of the requested surgical procedure which included lumbar decompression at L5-S1 with fusion, and noted that the claimant had been denied this surgery by the carrier on at least two prior occasions. The IRO stated that "based upon the objective physical findings and information in the medical records, that the [claimant] does not meet any of the selection criteria for lumbar spinal fusion." Further, the IRO states that "[t]he preoperative surgical indications are not met as cited by [ODG] criteria. It is unclear, despite the extensive evaluation and treatment that this [claimant] has undergone, exactly what is the source of his pain. In addition, there is no objective evidence of any spinal instability."

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 "[h]ealth 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. Section 401.011(18-a) defines "[e]vidence-based medicine" 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. 28 TEX. ADMIN. CODE § 133.308(t) (Rule 133.308(t)) provides that in a CCH, the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medicine.

In evidence is a lumbar spine x-ray completed on June 6, 2006, which shows "[m]inor lumbar degenerative change possibly with slight muscle spasm on the left." Also, an MRI of the lumbar spine dated September 5, 2006, shows, in part, central spinal canal and lateral recess stenosis on the right side at L5-S1 level and no evidence of spondylolysis or spondylolisthesis. In a medical report dated September 25, 2006, Dr. K states that the EMG study of the lower extremities is normal and that "[t]here was no evidence of any radicular process seen (lumbar radiculopathy)." The claimant underwent a lumbar discogram at L3-4, L4-5 and L5-S1 on March 7, 2007. The surgeon states in the report that no pain was noted at L3-4 and L4-5, and that "[i]nterestingly, the [claimant] did not notice an increase in his pain with the injection at L5-S1." However, the medical reports show that the claimant underwent a lumbar facet joint injection at L2-3 and L3-4 on June 26, 2007, and he underwent an epidural steroid injection (ESI) at L5-S1 on January 31, 2008. In a medical report dated February 27, 2008, the treating doctor, Dr. H, notes the discogram performed on March 7, 2007, showed that the claimant "had no pain elicited at any of the lower 3 intervertebral discs" but that the claimant continues with symptoms of low back and right leg that are "emanating from lateral recess stenosis at L5, facet hypertrophy, and foraminal stenosis, but with good maintenance of disc space height at L5-S1 and the other levels." In evidence is a Request for a Review by an IRO dated June 20, 2008, requesting a review of a surgery, lumbar decompression at L5-S1 with fusion, which was denied by the carrier.

The hearing officer specifically found that the requested lumbar decompression at L5-S1 and fusion is health care reasonably required for the compensable injury of _____, and that the claimant does meet the ODG guidelines for patient selection criteria and all the of the recommendations for pre-operative surgical indications. In the Background Information section of the decision, the hearing officer states that the claimant meets the "ODG criteria for the decompression/fusion" because "[d]espite some conflicting discogram information, an L5-S1 diagnostic ESI cleared up that uncertainty and identified L5-S1 as the only significant pain generator." Further, the hearing officer states that "[t]here is no demonstrated spinal instability, but that is not disqualifying."

As previously mentioned, the IRO determined that the claimant did not meet any of the patient selection criteria for lumbar spinal fusion "based upon the objective physical findings and information in the medical records." Additionally, the IRO determined that "there is no objective evidence of any spinal instability." The ODG

states that in cases of workers' compensation "there remains insufficient evidence to recommend fusion for chronic low back pain in the absence of stenosis and spondylolisthesis, and this treatment for this condition remains 'under study.'" The ODG states that "a negative discogram could rule out the need for fusion on that disc (but a positive discogram in itself would not justify fusion)." Dr. H noted that the discogram of March 7, 2007, showed that the claimant "had no pain elicited at any of the lower 3 intervertebral discs." Also, the ODG provides under patient selection criteria, that segmental instability may be an indication for spinal fusion but such segmental instability must be objectively demonstrable. There is no evidence of segmental instability.

In Appeals Panel Decision (APD) 080812-s, decided July 25, 2008, the hearing officer found that the spinal surgery was medically necessary treatment for the claimant's injury and determined that the preponderance of the evidence is contrary to the decision of the IRO. The Appeals Panel reversed the hearing officer's decision and rendered a new decision that the preponderance of the evidence is not contrary to the decision of the IRO. The Appeals Panel held that the claimant failed to present evidence consistent with the requirements of Section 401.011(22-a) to establish that the preponderance of the evidence is contrary to the decision of the IRO. In this case, as in APD 080812-s, the claimant failed to present evidence consistent with the requirements of Section 401.011(22-a) to establish that the preponderance of the evidence is contrary to the decision of the IRO.

We reverse the hearing officer's decision that the preponderance of the evidence is contrary to the decision of the IRO and render a new decision that the preponderance of the evidence is not contrary to the decision of the IRO.

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

MR. RUSSELL R. OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge