APPEAL NO. 081782
FILED FEBRUARY 18, 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 November 5, 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 respondent (claimant) is not entitled to a transforaminal interbody fusion with a two day length of stay (LOS) for the compensable injury of _____.

The appellant (carrier) appealed, contending that the hearing officer's decision is not based on evidence-based medicine and Official Disability Guidelines-Treatment in Workers' Compensation published by Work Loss Data Institute (ODG) guidelines. The appeal file does not contain a response from the 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. In evidence is a section of the ODG Procedure Summary for spinal surgery which specifies Patient Selection Criteria for Lumbar Spinal Fusion, Pre-Operative Surgical Indications and Patient Selection Criteria for Lumbar Spinal Fusions. The evidence established that the claimant's back condition has been treated with epidural steroid injections, physical therapy (which was discontinued because of pain) and medication.

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.

Dr. S, the doctor proposing the surgery, in a report dated August 10, 2007, stated that an "MRI examination shows an L5-S1 disc herniation with decreased disc space" and recommends the L5-S1 transforaminal lumbar interbody fusion. In a report dated May 2, 2008, Dr. S noted "MRI examination once again shows a [desiccated] disc at L5-S1 with protrusion (herniation) with a collapsed disc space at L5-S1" and diagnosed traumatic disc herniation with failed conservative management. Both of Dr. S's reports dated August 10, 2007, and May 2, 2008, indicate that the claimant was taking Skelaxin, Hydrocodone and other medication. Dr. S in a report dated June 26, 2008, again notes "decreased disc height at L5-S1" and a diagnosis of "traumatic disc herniation at L5-S1 with decreased disc height, rendering this particular segment of the lumbar spine unstable." Dr. S, in his August 10, 2007, report states that the claimant "has been having persistent depression, fragmented sleep disturbances, inappropriate irritability, and persistent anxiety."

The hearing officer, in her Background Information cited Dr. S's testimony as saying that he "cited literature as to why the proposed surgery was conservative treatment for the Claimant . . . ." Dr. S testified that he did not agree with the carrier's doctors and the IRO and cited an "AMA study" by Anderson. That study is not in evidence and no specific citation to the study is given. The hearing officer further commented that Dr. S "also testified that he personally reviewed the MRI scans and his opinion was credible when he opined that the Claimant suffers from loss of disc height and does suffer from instability at L5-S1." The hearing officer then found that the transforaminal interbody fusion with a two day LOS is health care reasonably required and that preponderance of the evidence is contrary to the decision of the IRO.

The only MRI in evidence is a MRI of the lumbar spine dated July 3, 2007, which states "Vertebral body height is well maintained. Intervertebral disc space height is preserved with mild desiccation of the L5-S1 intervertebral disc." The impression was L5-S1 shallow right paracentral and subarticular disc protrusion impinging on the right S1 nerve root. Dr. S testified at the CCH and when asked about the difference in his interpretation of the lumbar MRI and that of the radiologist who had prepared the report, Dr. S stated he had reviewed the actual MRI film and he disagreed with the radiologist. Flexion/extension X-rays of the lateral lumbar spine, performed on June 26, 2008, indicate the disc "interspaces are adequately maintained" and no subluxation or dislocation is seen with flexion or extension. Dr. B, a board certified neurosurgeon testified at the CCH that the medical records do not indicate a loss of disc height or segmental instability in the claimant's spine. Dr. B testified that he did not believe the proposed surgery was medically reasonable and necessary because the claimant did not meet the ODG guidelines showing lumbar instability.

The ODG's patient selection criteria for spinal fusion states that indications for spinal fusion may include objectively demonstrable segmental instability and the pre-operative surgical indications should include "[a]ll pain generators are identified and treated," "X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or discography . . . & MRI demonstrating disc pathology" and psychosocial screen with confounding issues addressed. Regarding the psychosocial screen, no separate

psychological evaluation is in evidence. Dr. S testified that he did a psychological evaluation in conjunction with his over-all evaluation. Dr. S testified that his psychological evaluation consisted of asking 12 questions during his examination, in conjunction with his over-all evaluation.

Dr. PG, a carrier peer review doctor, in a report dated _____, noted one of the indicators for fusion is instability and that "instability should be documented by objectified methods." Dr. PG further noted that Dr. S "has failed to demonstrate instability in the claimant's lumbar spine which obviates the need for fusion." Dr. DG, another carrier peer review doctor, in a report dated June 9, 2008, notes that there is "no evidence of spondylolisthesis or instability on flexion/extension films. No psychological evaluation is documented." Dr. DG does go on to state that "it appears that a simple decompression at the L5-S1 level may be indicated; however, there is no medical necessity for the proposed transforaminal interbody fusion."

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. Also, the ODG, under pre-operative surgical indications, provides for "Psychosocial screen with confounding issues addressed." (Emphasis in the original.) None of Dr. S's reports address a psychosocial screen or address the claimant's depression noted in Dr. S's May 10, 2007, report.

In Appeals Panel Decision 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. Likewise in this case, the claimant failed to present evidence consistent with the requirement 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.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge