APPEAL NO. 091896
FILED JANUARY 25, 2010

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 28, 2009. With regard to the only issue before her the hearing officer determined that the preponderance of the evidence is not contrary to the decision of the Independent Review Organization (IRO) that the respondent (claimant) is entitled to an L4-5 and L5-S1 laminectomy, posterior spinal instrumentation fusion (PSIF) with assistant surgeon and 3-day hospital stay for the compensable _____, injury.

The appellant (carrier) appeals, contending that the claimant failed to meet at least two of the pre-operative surgical indications of the Official Disability Guidelines (ODG). The claimant responds, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable lumbar sprain/strain injury on _____. The medical evidence indicated that the claimant's back condition had been treated with epidural steroid injections, physical therapy and conservative medical care. The claimant's treating doctor, (Dr. S), diagnosed the claimant with instability at L4-5 and recommended spinal fusion at L4-5 and L5-S1. The IRO recommended approval of the requested procedure. In evidence was a section of the ODG Procedure Summary for spinal surgery which stated in part Patient Selection Criteria for Lumbar Spinal Fusion, Pre-Operative Surgical Indications Recommended, and Patient Selection Criteria for Lumbar Spinal Fusion.

Section 408.021 provides in part 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 in part 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.

The hearing officer and the IRO quoted extensively from the ODG. The ODG provided under patient selection criteria, that segmental instability may be an indication for spinal fusion but such segmental instability must be objectively demonstrable. The portion of the ODG specifically litigated at the CCH is entitled "Pre-Operative Surgical Indications Recommended" and provides that pre-operative clinical surgical indications for spinal fusion should include all of the following:

> (1) All pain generators are identified and treated; & (2) All physical medicine and manual therapy interventions are completed; & (3) X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or discography (see discography criteria) & MRI demonstrating disc pathology; & (4) Spine pathology limited to two levels; & (5) Psychosocial screen with confounding issues addressed[; &] (6) For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing.

The ODG, under pre-operative surgical indications, provides for psychosocial screen with confounding issues addressed. None of the reports, or the IRO decision, referenced any psychosocial screening. The hearing officer recited the provision for a psychosocial screening but does not further comment on it or the absence of a psychosocial screening.

The IRO report in evidence listed the information provided to it for review. That information did not include flexion/extension x-rays or a psychosocial screening. Rather, the IRO relied on Dr. S's March 30, 2009, and April 27, 2009, reports and concluded in part that:

> The claimant has evidence of 1 cm of translation at the L4-L5 level on flexion/extension x-rays per [Dr. S's] report on 4-7-09 [sic 4-27-09].
>
> * * * *
>
> The appropriate surgical management of this case would be the recommended fusion at L4/L5 and L5/S1. Claimant has the signs and symptoms of instability. The L5/S1 instability has been documented by flexion/extension x-rays.
>
> * * * *

Both of Dr. S's reports dated March 30, 2009, and April 27, 2009, were in evidence. Dr. S, in a report dated March 30, 2009, referenced lateral flexion and extension x-rays "which reveals a grade 1 dynamic L4-5 degenerative spondylolisthesis that translates approximately 1 cm forward and backward with flexion and extension. She has mild loss of disc height at L5-S1." In a report dated April 27, 2009, Dr. S stated: "[t]his patient has dynamic instability on flexion and extension at L4-5. She has approximately 1 cm of translation which I think is significant."

The hearing officer commented that both the IRO and (Dr. D), a carrier utilization reviewer, rely upon the ODG in reaching their conclusions. The hearing officer and the IRO referred to Dr. S's April 27, 2009, report which stated that x-ray results were not noted and which only referenced instability on flexion and extension at L4-5. The hearing officer determined that the preponderance of the evidence-based medical evidence was not contrary to the IRO's decision in this case. The carrier contends that L5-S1 instability has not been documented by flexion/extension x-rays. Dr. D testified that there were no flexion/extension x-rays showing instability at L5-S1 and 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, particularly at the L5-S1 level.

The carrier, in this case, presented evidence consistent with the requirements of Section 401.011(22-a) that the preponderance of the evidence is contrary to the decision of the IRO. As previously noted, none of the reports or IRO decision referenced any psychosocial screening. Accordingly, we hold that the preponderance of the evidence is contrary to the decision of the IRO because the requirements of the ODG were not met.

We reverse the hearing officer's determination that the preponderance of the evidence is not contrary to the decision of the IRO and that the claimant is entitled to an L4-5 and L5-S1 laminectomy, PSIF with assistant surgeon and 3-day hospital stay for the compensable _____, injury and render a new decision that the preponderance of the evidence is contrary to the decision of the IRO and that the claimant is not entitled to an L4-5 and L5-S1 laminectomy, PSIF with assistant surgeon and 3-day hospital stay for the compensable _____, injury.

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

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge