

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 benefit contested case hearing was held on March 31, 2008, to decide the following disputed issue:

Whether the preponderance of the evidence is contrary to the decision of the Independent Review Organization (IRO) that work hardening/conditioning is not a reasonable and necessary treatment for the compensable injury of ___?

PERSONS PRESENT

Claimant appeared and was assisted by an (Ombudsman). Carrier appeared and was represented by an (Attorney).

BACKGROUND INFORMATION

Claimant worked as a housekeeper for (Employer) when she sustained injury as a result of a fall. Claimant sustained a closed displaced bimalleolar ankle fracture. Claimant underwent surgery on June 21, 2007. Claimant attended post-surgery physical therapy, and, at the end of the therapy course, Claimant's surgeon, Dr. J, recommended a work conditioning/hardening program to improve her flexibility and movement in her ankle. He noted as the rationale for the treatment that he believed that this was "the only option left as far as treatment is concerned that may improve her ability to return to gainful employment or attempt her previous level of employment in her current condition."

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**.

Accordingly, in a medical necessity dispute, the first issue is whether the proposed care is consistent with the *ODG*. The IRO, identified as a board certified orthopaedic surgeon, upheld the denial stating that work conditioning five times per week for two weeks is not medically necessary. The IRO notes that the *ODG* does not have a recommendation for a work hardening/conditioning program following operative fixation of an ankle fracture.

When weighing medical evidence, the hearing officer must first determine whether the doctor giving the expert opinion is qualified to offer it, but also, the hearing officer must determine whether the opinion is relevant to the issues in the case and whether the opinion is based upon a reliable foundation. An expert's bald assurance of validity is not enough. See *Black v. Food Lion, Inc.*, 171 F.3rd 308 (5th Cir. 1999); *E.I. Du Pont De Nemours and Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). When determining reliability, the hearing officer must consider the evidence in terms of (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *Kelly v. State*, 792 S.W.2d 579 (Tex. App.-Fort Worth 1990) *affd*, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992).

In the case at hand, the Claimant failed to meet her burden of proof. Claimant did not present evidence-based medical evidence as to the appropriateness of the proposed work hardening/conditioning. Also, the Claimant did not establish that no such evidence-based medical evidence is available nor evidence that the proposed procedure meets generally accepted standards of medical practice recognized in the medical community. Again, there is no recommendation in the *ODG* for a work hardening/conditioning program for this diagnosis. Dr. A's request, which acknowledges the lack of a *ODG* recommendation, essentially asks for an exception to the *ODG*, without proper evidence justifying same. This does not meet the requisite evidentiary standard required to overcome the presumption afforded the IRO. The preponderance of the evidence is not contrary to the IRO decision.

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) when she sustained a compensable injury.

- C. The IRO determined that the requested work hardening/conditioning program was not reasonable and necessary health care for the compensable injury of ___.
2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and name and street address of Carrier's registered agent which was admitted into evidence as Hearing Officer's Exhibit Number 2.
 3. The treating doctor requested a work hardening/conditioning program following Claimant's ankle fracture surgery.
 4. The *ODG* does not have a recommendation for a work hardening/conditioning program following operative fixation of an ankle fracture.
 5. Claimant did not present evidence-based medical evidence as to the appropriateness of the proposed work hardening/conditioning program.
 6. Claimant did not establish that no such evidence-based medical evidence is available a work hardening/conditioning program following operative fixation of an ankle fracture.
 7. Claimant did not establish that the proposed work hardening/conditioning program meets generally accepted standards of medical practice recognized in the medical community.
 8. The preponderance of the evidence is not contrary to the decision of IRO that a work hardening/conditioning program is not a reasonable and necessary health care service 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 was proper in the (City) Field Office.
3. A work hardening/conditioning program is not a reasonable and necessary health care service for the compensable injury of ___.

DECISION

A work hardening/conditioning program is not a reasonable and necessary health care service 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 Section 408.021.

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

**LEO F. MALO
ZURICH AMERICAN INSURANCE COMPANY
12222 MERRITT DRIVE, SUITE 700
DALLAS, TEXAS 75251**

Signed this 10th day of April, 2008.

Deeia Beck
Hearing Officer