

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 April 2, 2008, to decide the following disputed issues:

1. Whether the preponderance of the evidence is contrary to the decision of the Independent Review Organization (IRO) that the third right L4/L5 transforaminal epidural steroid injections with fluoroscopy is not a reasonable and necessary treatment for the compensable injury of ___?
2. Did the Claimant timely dispute the IRO determination?

PERSONS PRESENT

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

BACKGROUND INFORMATION

Claimant was injured lifting bags of concrete while working for Employer on ____. Claimant had continuing back pain from the injury and underwent physical therapy. As it was not successful in resolving his pain, he completed a chronic pain management program. As this was also not successful, Claimant's doctor recommended epidural steroid injections and Claimant received two right L4-L5 transforaminal epidural steroid injections. The office notes document that Claimant received 50-60% pain relief for about two weeks. An office visit with Dr. P on May 29, 2007, some eight days after the second injection, noted no pain relief. The clinical notes do not reveal if any increase in function was realized by Claimant as a result of either injection.

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 medical doctor board certified in pain management and anesthesiology, upheld the denial noting that a third epidural injection is not medically necessary. The IRO notes that the *ODG* does not recommend that a repeat steroid injection is indicated unless there is documentation of at least 50-70% pain reduction for at least six to eight weeks after the injection. The IRO notes a letter sent by Dr. V who stated that Claimant received 70% pain reduction, but, as pointed out by the IRO, this was not charted in the office notes, and, even if correct, the maximum relief period was for two weeks. A reduction for this short a time period does not meet the *ODG* standard for a third injection. Additionally, Dr. V's letter references how there is extensive literature that goes against the *ODG* guidelines and that 2004 and 2005 studies proves the "series of three" approach to these injections is most effective in contravention to the *ODG*. These studies are not specifically cited nor was there evidence of these studies presented at the hearing.

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 his burden of proof. Claimant did not justify his need for a third right L4-L5 transforaminal epidural steroid injection based on the *ODG* or any other evidence-based medical evidence. 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.

Lastly, Carrier argues that Claimant's request for a Medical Contested Case Hearing was untimely. There is no rule presently in place mandating a deadline for the filing of these requests. The fact as argued by Carrier that spinal surgery requests have specific deadlines is not binding or persuasive as to the present claim. I find Claimant's request was timely.

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 he sustained a compensable injury.
 - C. The IRO determined that the requested third right L4-L5 transforaminal epidural steroid injection 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. Dr. V requested a third right L4-L5 transforaminal epidural steroid injection.
4. The *ODG* does not recommend a repeat epidural steroid injection unless there is documentation of at least 50-70% pain reduction for at least six to eight weeks after the injection.
5. The Claimant did not present evidence of at least 50-70% pain reduction for at least six to eight weeks after the second injection.
6. Claimant did not establish the third right L4-L5 transforaminal epidural steroid injection complied with the *ODG* or evidence-based medical evidence.
7. The preponderance of the evidence is not contrary to the decision of IRO that a third right L4-L5 transforaminal epidural steroid injection is not a reasonable and necessary health care service for the compensable injury of ____.
8. There is no rule presently in place concerning the time in which parties must appeal IRO decisions.

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 third right L4-L5 transforaminal epidural steroid injection is not a reasonable and necessary health care service for the compensable injury of ____.

4. Claimant's appeal of the IRO decision was timely.

DECISION

A third right L4-L5 transforaminal epidural steroid injection is not a reasonable and necessary health care service for the compensable injury of _____. Claimant's appeal of the IRO decision was timely.

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 **(SELF-INSURED)** and the name and address of its registered agent for service of process is

**CORPORATION
(ADDRESS)
(CITY), TEXAS (ZIP CODE)**

Signed this 14th day of April, 2008.

Deeia Beck
Hearing Officer