

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 26, 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 arthroscopy/meniscectomy of the left knee is not, a reasonable and necessary health care service for the compensable injury of ____?

PERSONS PRESENT

Claimant appeared and was assisted by ombudsman. Carrier appeared and was represented by attorney.

BACKGROUND INFORMATION

On ____, Claimant sustained a compensable injury while carrying metal shingles. He testified that his left leg locked, was painful, and began to swell and continued to swell throughout the day. Claimant saw the company doctor on June 5, 2007 and was prescribed over-the-counter pain relievers and anti-inflammatory medication. Physical therapy was ordered, but denied while Claimant was in the middle of his first visit. The therapist showed him some exercises, which he performed at home.

Claimant ultimately saw an orthopedic surgeon, Dr. H, who recommended arthroscopic meniscectomy of the left knee to remove a cleavage tear of the meniscus. Carrier denied the treatment and was successful in the IRO process in its denial of the treatment.

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**.

The initial inquiry, therefore, in any dispute regarding medical necessity, is whether the proposed care is consistent with the *ODG*.

The Carrier initially denied preauthorization for the requested left knee arthroscopic meniscectomy citing the *ODG*, and the fact that a June 25, 2007 MRI of the left knee showed degenerative changes with no evidence of meniscal or ligament tears. That reviewer noted that physical examination provided no range of motion measurements or orthopedic tests and no history of conservative treatment. On reconsideration, preauthorization was again denied. The second reviewer also cited the *ODG* indications for meniscectomy surgery and stated that clarification was needed regarding clinical indications to pursue the procedure, and based on the clinical information available the requested procedure was not indicated.

The IRO reviewer, an orthopedic surgeon, upheld the preauthorization denial. He noted that the physical examination of September 12, 2007, revealed few, if any, positive physical findings suggestive of a meniscal tear and the fact that plain x-rays and the MRI revealed only chondromalacia with no evidence of meniscal tearing. He opined that Claimant lacked the diagnostic criteria for the performance of arthroscopic meniscectomy. He noted that while the MRI did not reveal meniscal tearing, Claimant's surgeon questioned the quality of the study, but concluded that in the absence of imaging criteria, arthroscopic meniscectomy could not be justify. The IRO reviewer checked off the "ODG" box in the section entitled "A Description and the Source of the Screening Criteria or Other Clinical Basis Used to Make the Decision."

The records of Dr. H reveal that on September 12, 2007, he examined Claimant and found very tender medial meniscus and effusion of 50 cc and reviewed the MRI, which he thought showed some tearing of the medial meniscus and some patellofemoral chondromalacia. He noted that the radiologist did not find the tearing, but opined that the film was not very good. He recommended arthroscopic meniscectomy.

Following the preauthorization denial, Dr. H briefly answered ombudsman questions and cited tender medial meniscus and positive McMurray signs, effusion and pain on knee flexion as positive physical findings suggestive of a meniscal tear. In response to a question about an explanation for why the IRO reviewer may not have been able to detect a meniscus tear, Dr. H replied, "ask him."

As noted previously herein, "health care reasonably required" means health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine or if that evidence is not available, generally accepted standards of medical practice recognized in the medical community.

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).

In the instant case, the claimant failed to meet his burden of proof. While the claimant presented evidence and the recommendation of his treating doctor, the claimant failed to present evidence-based medical evidence as to the appropriateness of the proposed procedure, he failed to establish that no such evidence-based medical evidence is available, and he failed to present evidence that the proposed procedure meets generally accepted standards of medical practice recognized in the medical community. The ODG criteria for meniscectomy include 1) conservative care (physical therapy, medication or activity modification); 2) subjective clinical findings (joint pain or swelling or feeling of give way or locking, clicking or popping); 3) objective clinical findings (positive McMurray's sign or joint line tenderness or joint effusion, limited range of motion or locking, clicking or popping or crepitus); *and* 4) imaging clinical findings (meniscal tear on MRI). The reports of Dr. H do not establish the appropriateness of the proposed left knee meniscectomy in the context of the ODG criteria. As such, the proposed procedure is a departure from the ODG. Dr. H's post-IRO cursory answers to the ombudsman's questions regarding the nature of Claimant's injury and proposed treatment, without sufficient reference to the *ODG* or other evidence-based medicine justifying departure from the *ODG* (or explanation as to how Claimant's symptoms and the proposed procedure fall within the ODG) do 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 and the requested arthroscopy/meniscectomy of the left knee for this injured employee does not meet the criteria set out in the *ODG*.

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 the when he sustained a compensable injury.
 - C. The IRO determined that the requested services were not reasonable and necessary health care services for the compensable injury of ____.
2. Respondent delivered to Petitioner 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 left knee arthroscopy/meniscectomy.
4. The requested service is not consistent with the *ODG* criteria for meniscectomy.

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. The preponderance of the evidence is not contrary to the decision of IRO that arthroscopy/meniscectomy of the left knee is not a reasonable and necessary health care service for the compensable injury of ____

DECISION

The preponderance of the evidence is not contrary to the decision of IRO that arthroscopy/meniscectomy of the left knee 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 **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST #300
IRVING, TEXAS 75063.**

Signed this 22nd day of May, 2008.

Erika Copeland
Hearing Officer