

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.

ISSUES

A contested case hearing was held on October 16, 2008 to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the IRO that the claimant is not entitled to a repeat EMG/NCV of the lower extremities and a repeat lumbar MRI for the compensable injury of _____?

Based on Carrier's response, the following issue was added:

2. Did the Claimant timely his appeal of the decision of the IRO?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by NG, ombudsman. Respondent/Carrier appeared and was represented by DP, attorney.

BACKGROUND INFORMATION

Claimant sustained a compensable lumbar spine injury on _____. Claimant has undergone physical therapy and epidural injections as a result of this injury. Claimant underwent an EMG/NCV of the lower extremities on January 19, 2007 which was normal. Claimant underwent an MRI of the lumbar spine on September 26, 2006 that revealed a minimal broad-based disc bulge and facet hypertrophy at L4-5 resulting in minimal central canal and bilateral foraminal stenosis and bilateral foraminal stenosis at L5-S1. The Claimant testified that he continues to suffer from lumbar pain radiating to his lower extremities. The Claimant's treating doctor has recommended a repeat MRI of the lumbar spine and another EMG/NCV of the lower extremities. This procedure was denied by the Carrier and submitted to an IRO who upheld the Carrier's denial.

The IRO concluded that there had been no change in the Claimant's exam or complaints since the last diagnostic testing and, according to the *ODG* (Official Disability Guidelines), repeat MRI's are not medically necessary unless there has been a progression of deficits. The IRO reviewer went on to state that an EMG was negative in January 2007 and, without a change in complaints or exam, another one is not warranted. The IRO determined that a repeat MRI and EMG are not medically necessary.

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 *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*.

Under the *ODG*, in reference to repeat MRI's and EMG's , the recommendation is:

Repeat MRI's are indicated only if there has been progression of neurologic deficit. (Bigos, 1999) (Mullin, 2000) (ACR, 2000) (AAN, 1994) (Aetna, 2004) (Airaksinen, 2006) (Chou, 2007) Recommended as an option (needle, not surface). EMGs (electromyography) may be useful to obtain unequivocal evidence of radiculopathy, after 1-month conservative therapy, but EMG's are not necessary if radiculopathy is already clinically obvious. (Bigos, 1999) (Ortiz-Corredor, 2003) (Haig, 2005) No correlation was found between intraoperative EMG findings and immediate postoperative pain, but intraoperative spinal cord monitoring is becoming more common and there may be benefit in surgery with major corrective anatomic intervention like fracture or scoliosis or fusion where there is significant stenosis. (Dimopoulos, 2004) EMG's may be required by the AMA Guides for an impairment rating of radiculopathy. (AMA, 2001) (Note: Needle EMG and H-reflex tests are recommended, but Surface EMG and F-wave tests are not very specific and therefore are not recommended. See Surface electromyography.)

The Claimant's treating doctor, Dr. Z, did not respond to the IRO's determination nor did he explain why the additional diagnostic tests would be appropriate or necessary considering evidence based medicine. Additionally, Dr. Z's medical records do not document any progression of neurological deficits to warrant a repeat MRI or EMG per the *ODG*. Based on the evidence presented, the Claimant failed to provide evidence based medicine sufficient to contradict the determination of the IRO and the greater weight of the credible evidence is not contrary to the decision of the IRO.

The Carrier raised the issue of whether or not the Claimant timely filed his appeal of the IRO. Pursuant to Rule 133.308(t)(B)(i), the written appeal must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party and must be filed in compliance with Division rules. Requests that are timely submitted to a Division location other than the Division's Chief Clerk, such as a local field office of the Division, will be considered timely filed and forwarded to the Chief Clerk for processing; however, this may result in a delay in the processing of the request. The IRO decision was sent to the parties, including the Claimant, on June 6, 2008 and an amended copy of the IRO determination was sent to the parties on June 9, 2008. The IRO decision was sent to the Claimant's address of record and the Claimant signed his request for a medical contested case hearing on June 17, 2008; however, this request was not

filed with the Chief Clerk of Proceedings until July 2, 2008 which was more than 20 days after the date the IRO was sent to the parties.

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.
2. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. The treating doctor requested the Claimant undergo a repeat lumbar MRI and EMG/NCV of the lower extremities for the compensable injury of _____.
4. The requested service is not consistent with the *ODG* criteria for repeat MRI's and EMG's.
5. The Claimant failed to provide evidence based medicine contrary to the IRO's determination that a repeat MRI of the lumbar spine and EMG/NCV of the lower extremities are not reasonable and necessary health care services for the compensable injury of _____.
6. The IRO decision was sent to the parties on June 6, 2008 and an amended IRO decision was sent to the parties on June 9, 2008.
7. Claimant filed his request for a medical contested case hearing with the Chief Clerk of Proceedings on July 2, 2008 which was not within 20 days of the date the IRO decision was sent to the parties pursuant to Rule 133.308(t)(B)(i).

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of the IRO that a repeat lumbar MRI and EMG/NCV of the lower extremities are not health care services reasonably required for the compensable injury of _____.

4. The Claimant did not timely appeal the decision of the IRO.

DECISION

Claimant is not entitled to a repeat lumbar MRI and EMG/NCV of the lower extremities for the compensable injury of _____. The Claimant did not timely appeal the decision of the IRO.

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 §408.021.

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

**RUSSELL OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TX 78723**

Signed this 16th day of October, 2008.

Carol A. Fougerat
Hearing Officer