

**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 9, 2008 to decide the following disputed issues:

1. Is the preponderance of the evidence contrary to the IRO decision that Claimant is not entitled to an office visit with EMG/NCV of the right lower extremity for the compensable injury of \_\_\_\_\_?
2. Is the preponderance of the evidence contrary to the IRO decision that Claimant is not entitled to a discogram with post discogram CT scan of the lumbar spine for the compensable injury of \_\_\_\_\_?

**PARTIES PRESENT**

Claimant appeared and was represented by CS, Attorney.

Carrier appeared and was represented by SL, Attorney.

**BACKGROUND INFORMATION**

Claimant injured his lumbar spine in a lifting incident at work on \_\_\_\_\_. Claimant received conservative treatment to include physical therapy and injections with no lasting relief. Claimant had a MRI of the lumbar spine in January 2007. It was read to show a disc protrusion at L5-S1 with impingement on the right S1 nerve root.

In November 2007, Claimant had a percutaneous discectomy. Claimant did not receive any relief from this procedure. In February 2008, the treating doctor noted that Claimant had failed conservative care and he recommended a work-up with a view of considering spinal surgery. A new MRI was read to show disc herniations at the L4-5 and L5-S1 with nerve impingement at both levels. The treating doctor further requested an EMG/NCV study and a discogram with post discogram CT scan of the lumbar spine. Both of these medical procedures are the subject of this hearing.

The Carrier denied both medical diagnostic tests and the Claimant requested review by an independent review organization (IRO). The IRO decision upheld the Carrier's denial of the requested testing in both cases and Claimant has appealed to this Contested Case Hearing.

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. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) 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 evidence based medicine or, if evidence based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence based medicine if that evidence is available. Evidence based medicine is further defined in Texas Labor Code Section 401.011 (18a) to be 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 accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the Official Disability Guidelines (ODG).

This Contested Case Hearing is an appeal of the IRO decisions. The IRO decisions carry presumptive weight and until expert medical evidence is presented that is contrary to the IRO decisions, those decisions must stand. Both IRO decisions, in this case, at least attempt to present evidence-based medicine to justify their denial of the diagnostic testing in question. Both state that the decision is based on their interpretation of the Official Disability Guidelines (ODG). In contrast, the treating doctor's request for the diagnostic procedures does not address the ODG or any other source of evidence-based medicine.

Claimant argues, through his attorney, that he in fact complied with the ODG. He reviewed the medical records and points out that the criteria set out in the ODG was noted some place in the medical records. For example, Claimant notes that one of the criteria for a discogram is "failure of recommended conservative treatment including active physical therapy." He points to medical records showing that he had physical therapy and that later, medical records show that he continues to have pain. Claimant contends this is sufficient to show that he has failed conservative care and he meets this particular ODG criteria.

I agree with the Claimant's position, only in part. I agree that there are some medical criteria listed in treatment guidelines that are very straight forward and require no medical judgment. In such situation, I believe the hearing officer can conclude that a criteria has or has not been met. However, most treatment guidelines require some level of expert medical judgment to determine whether it has been met or not. I think "failed conservative care" is such a criteria that requires medical judgment on behalf of someone qualified to make that decision. It is this expert medical opinion as to whether the Claimant complied with the ODG that is lacking in this case.

Claimant has failed to present evidence contrary to the IRO decisions and he is not entitled to the diagnostic testing in question.

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).
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 3.
3. Claimant failed to provide evidence-based medicine to support his request for an office visit with EMG/NCV testing of the right lower extremity.
4. An office visit with EMG/NCV testing of the right lower extremity is not reasonably required medical treatment for the compensable injury of \_\_\_\_\_.
5. Claimant failed to provide evidence-based medicine to support his request for a discogram with post discogram CT scan of the lumbar spine.
6. A discogram with post discogram CT scan of the lumbar spine is not reasonably required medical treatment 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 is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the IRO decision that Claimant is not entitled to an office visit with EMG/NCV of the right lower extremity for the compensable injury of \_\_\_\_\_.
4. The preponderance of the evidence is not contrary to the IRO decision that Claimant is not entitled to a discogram with post discogram CT scan of the lumbar spine for the compensable injury of \_\_\_\_\_.

## **DECISION**

Claimant is not entitled to an office visit with EMG/NCV of the right lower extremity for the compensable injury of \_\_\_\_\_. Claimant is not entitled to a discogram with post discogram CT scan of the lumbar spine 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 §408.021.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY**, and the name and address of its registered agent for service of process is:

**TREVA DURHAM  
1000 HERITAGE CENTER CIRCLE  
ROUND ROCK, TEXAS 78664.**

Signed this 31st day of October, 2008.

Donald E. Woods  
Hearing Officer