

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 20, 2008 to decide the following disputed issues:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (hereinafter "IRO") that the Claimant / Petitioner is not entitled to a right lumbar medial branch block at L4-L5 (64475, 77003, Q9949) for the compensable injury of _____?
2. Did the Claimant/Petitioner timely appeal the IRO decision?

PARTIES PRESENT

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

BACKGROUND INFORMATION

Claimant/Petitioner was a Food Services Director for the employer, (Employer). She testified that on _____, while lifting a roast out of an oven and placing it on a cart, she experienced pain to her lower back. From the medical records in evidence, it was gathered that the Claimant/Petitioner was initially seen and treated by Dr. GSK, M.D., who prescribed oral medications, some injections, a rehabilitation program and a referral for pain management. During this time, an MRI of the lumbar spine was completed on October 28, 2005 which revealed L3-L4 mild diffuse disc bulge, L4-L5 disc bulge and L5-S1 mild diffuse disc bulge. A subsequent MRI of the lumbar spine was achieved on October 18, 2007 which noted a 3 mm disc bulge at L3-L4, a 6-7 mm central mild right disc herniation at L4-5 impressing origin of right L5 nerve root and slight impression on left nerve root, and a 4-5 mm central to right disc protrusion at L5-S1. The Claimant/Petitioner also had an EMG/NCV study performed by Dr. RM, M.D., on November 12, 2007 which revealed right L5 radiculopathy. Dr. AO, M.D., has seen and treated the Claimant/Petitioner and referred her to Dr. JET, M.D., an orthopedic surgeon. Dr. JET has recommended that the Claimant/Petitioner undergo an anterior lumbar interbody fusion at L4-L5. In addition, the Claimant / Petitioner undertook three (3) lumbar epidural steroid injections with the last being done on February 7, 2008 by Dr. DS, M.D. None of the injections relieved her pain. As a result thereof, Dr. DS requested approval of a L4-L5 medial branch block injection. Such requested treatment underwent utilization review by Dr. RH, M.D., and was denied based on the ODG. Reconsideration was requested on April 8, 2008 by Dr. DS and such reconsideration was denied by Dr. GB, M.D., based on the ODG. The Claimant/Petitioner then appealed the denials to an IRO and the IRO reviewer upheld the previous adverse determinations

on May 19, 2008. Consequently, the Claimant/Petitioner appealed the IRO decision and is the reason for the present discussion and decision.

DISCUSSION

The Carrier/Respondent argued that there is no jurisdiction to hold a Medical Contested Case Hearing (hereinafter "MCCH") in this matter as the Claimant/Petitioner failed to comply with the 20-day deadline contained in the applicable Texas Department of Insurance - Division of Workers' Compensation (hereinafter "Division") Rules. *See* Division Rule 133.308(t)(B)(i). Conversely, Claimant/Petitioner argued that there is jurisdiction to hold a MCCH in this matter as the 20-day deadline contained in the applicable Division Rules did not apply in her case due to the fact that the IRO decision was issued and received prior to the effective date¹ of the applicable Division Rules. In other words, the Claimant/Petitioner maintained that there is no deadline for filing an appeal of the IRO decision applicable to her case. From a reading of the applicable provisions and pertinent case law, the Division does have subject-matter jurisdiction to hear this case. *See Igal v. Brightstar Info. Technology Group, Inc.*, 250 S.W.3d 78 (Tex. 2008); *see also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000) and *City of Seabrook v. Port of Houston Auth.*, 199 S.W.3d 403 (Tex.App.-Houston [1st Dist.] 2006, pet. abated). Therefore, the ensuing discussion will relate to whether the Claimant/Petitioner timely appealed the IRO decision.

Rule 133.308(t)(B)(i) states, to wit:

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 the Division rules.

Id (emphasis added). Essentially, the Rule actually provides for two separate deadlines for the filing of an appeal of the IRO decision with the later in time applying. A review of the adopted comments to the Rule reveals that the language adopting this 20-day deadline was modified in order to accommodate medical review cases such as that of the Claimant/Petitioner. One commenter had argued that the adoption of the 20-day deadline would render all medical review cases filed since September 1, 2007 unappealable. In response, the Division modified the 20-day deadline language for both Medical Fee Disputes and Medical Necessity Disputes to include the language that appeals must be filed within 20 days from the effective date of the applicable Rule. The Division clearly stated that this Rule applied to IRO determinations issued both before and after the effective date of the Rule. Thus, the deadline for appealing the pre-existing² IRO decisions was started on the effective date of the Rule and extended forward 20 days.

In this particular case, the IRO decision was issued on May 19, 2008 which was prior to the effective date of the Rule. Therefore, the applicable deadline for the filing of the appeal of the IRO decision in this case was 20 days from the effective date of the Rule which was May 25, 2008. The Claimant/Petitioner admitted that she did not appeal the IRO decision until August 2008. Furthermore, the parties stipulated that the Division received the Claimant/Petitioner's appeal of the IRO decision on August 14, 2008. There are no other applicable provisions and/or

¹ May 25, 2008.

² Those issued prior to May 25, 2008.

Division Rules providing for extensions of and/or good cause exceptions to the 20-day deadline for appealing the IRO decisions. Since the Claimant/Petitioner did not comply with the 20-day deadline contained in the applicable Division Rules, the appeal of the IRO decision was untimely and is hereby dismissed. As such, a decision on the merits of this case will not be reached and the IRO decision is upheld.

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/Petitioner was the employee of (Employer).
 - C. On _____, Claimant/Petitioner sustained a compensable injury.
 - D. On May 19, 2008, the IRO issued a decision.
 - E. On August 14, 2008, the Texas Department of Insurance - Division of Workers' Compensation received the Claimant/Petitioner's appeal of the IRO decision.
2. Carrier/Respondent delivered to Claimant/Petitioner a single document stating the true corporate name of Carrier/Respondent, and the name and street address of its registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. The IRO determined that the requested right lumbar medial branch block at L4-L5 (64475, 77003, Q9949) was not reasonable and necessary health care services for the compensable injury of _____.
4. The Claimant/Petitioner's appeal of the IRO decision was not filed within the 20-day deadline contained in Division Rule 133.308(t)(B)(i).
5. A right lumbar medial branch block at L4-L5 (64475, 77003, Q9949) is not health care reasonably required 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 Claimant/Petitioner's appeal of the IRO decision was untimely.

4. The preponderance of the evidence is not contrary to the decision of the IRO that a right lumbar medial branch block at L4-L5 (64475, 77003, Q9949) is not health care reasonably required for the compensable injury of _____.

DECISION

The Claimant/Petitioner's appeal of the IRO decision was untimely. The Claimant/Petitioner is not entitled to a right lumbar medial branch block at L4-L5 (64475, 77003, Q9949) for the compensable injury of _____.

ORDER

The Carrier/Respondent is not liable for the benefits at issue in this hearing. The Claimant/Petitioner 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 HWY. 290
AUSTIN, TEXAS 78723**

Signed this 9th day of January, 2009.

Julio Gomez, Jr.
Hearing Officer