

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 May 19, 2009 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the IRO that the Claimant is not entitled to outpatient reconstruction surgery of the right posterior tibial tendon for the compensable injury of _____?

PARTIES PRESENT

Petitioner did not appear. Claimant appeared and was assisted by RPR, ombudsman. Respondent/Carrier appeared, by telephone, and was represented by HF, attorney.

BACKGROUND INFORMATION

Claimant sustained a compensable injury to his right ankle on _____ when he tripped and fell twisting his ankle. Claimant was initially diagnosed with an acute ankle sprain. The x-rays performed on _____ showed no fracture but questionable defect to the posterior tibia. Claimant was placed in a fracture boot, given crutches and prescribed pain medication. The Claimant testified that he was in the walking boot for approximately one month. The Claimant began treating at the (Healthcare Provider) in May 2008 and was referred for an MRI of the right ankle. The MRI was performed on May 9, 2008 and revealed mild tenosynovitis and tendinosis of the posterior tibial tendon, chronic sprain of the ATFL and sub acute sprain of the PTFL. On June 12, 2008, Dr. P performed a steroid injection to the posterior tibial tendon. Claimant was placed in a short leg cast on July 24, 2008 and the Claimant testified that he was in the cast for approximately four weeks. The medical records indicate the Claimant was casted for three weeks. Claimant was also given custom made orthotics which he testified he used for approximately six months and that he now has a second set of orthotics that he was fitted for on February 27, 2009.

According to Dr. P's October 20, 2008 report, the Claimant was doing "markedly better" and no further treatment was recommended. The Claimant returned to Dr. P on January 12, 2009 with complaints of an increase in foot pain. On January 20, 2009, Claimant was examined by Dr. R for a second opinion regarding the surgery proposed by the Claimant's treating doctor. Dr. R determined that the Claimant had, "exhausted a lot of his conservative measures and was a good candidate for surgery as recommended by Dr. P." Dr. P has recommended reconstruction of the posterior tibial tendon which was denied by the Carrier and referred to an IRO who determined that the recommended treatment was not medically necessary.

The IRO reviewer, a board certified orthopedic surgeon, upheld the previous adverse determination concluding that the proposed surgery was not medically indicated and necessary at this time. The IRO reviewer noted that the MRI of May 13, 2008 does not confirm a posterior tibial tendon tear, that the Claimant has not had a custom orthosis which corrects his deformities and that the Claimant has not had long-term utilization of the boot or cast. The IRO reviewer correctly noted that the *ODG* does not address posterior tibial tendon reconstruction, however, the IRO reviewer based his/her opinion using medical judgment, clinical expertise and expertise in accordance with accepted medical standards, the *ODG* and peer reviewed nationally accepted medical literature (specifically the AAOS, Orthopedic Knowledge Update 9, Fischgrund, editor, chapter 41, pages 513-514).

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.

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 *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 *ODG*. In this case, the requested procedure is not addressed in the *ODG*.

In accordance with Rule 133.308(t), Claimant, as the party appealing the IRO decision has the burden of overcoming the IRO decision by a preponderance of evidence-based medical evidence. The Claimant's treating doctor did not respond to the determination of the IRO nor did he address the concerns raised by the IRO regarding the conservative measures the Claimant has undergone for his right ankle. The Claimant testified that he did use the walking boot, the short leg cast and custom made orthotics; However, the IRO reviewer had this information when making the recommendation. The Claimant failed to present an evidence-based medical opinion to overcome the IRO’s decision. Dr. P’s records and conclusory statements, without evidence-based medicine, do not meet the requisite evidentiary standard required to overcome the IRO.

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).
- C. Claimant sustained a compensable injury on _____.
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 IRO determined that the requested outpatient reconstruction surgery of the right posterior tibial tendon was not medically indicated and necessary at this time.
 4. The Claimant failed to produce evidence based medicine contrary to the determination of the IRO.
 5. The requested outpatient reconstruction of the right posterior tibial tendon 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 preponderance of the evidence is not contrary to the decision of the IRO that outpatient reconstruction of the right posterior tibial tendon is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to outpatient reconstruction of the right posterior tibial tendon 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 **(SELF-INSURED)** and the name and address of its registered agent for service of process is:

AS, JR., P.E.
EXECUTIVE DIRECTOR
(SELF-INSURED)
(STREET ADDRESS)
(CITY), TX (ZIP CODE)

Signed this 20th day of May, 2009.

Carol A. Fougerat
Hearing Officer