

**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 contested case hearing was held on September 2, 2009, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that a spinal logic bone growth stimulator is not a reasonable and necessary health care service for the compensable injury of \_\_\_\_\_?

**PARTIES PRESENT**

The Petitioner/Claimant appeared and was assisted by PG, ombudsman. The Carrier appeared and was represented by SS, attorney.

**BACKGROUND INFORMATION**

It was stipulated that the claimant sustained a compensable injury on \_\_\_\_\_ when he was leaning back in his chair and the chair broke, causing the claimant to fall back and hit the floor. Claimant has had an extensive medical history with this injury, including physical therapy, medication and conservative treatment. On November 18, 2008, DR. J, M.D. performed a laminectomy/foraminotomy at L2-L3 and L3-L4, posterolateral fusion at L2-L3 and L3-L4, and segmental instrumentation at L2-L4. Claimant had surgery for hardware removal on February 12, 2009. DR. J requested a bone growth stimulator in April, 2009 to increase the chance of healing and to reduce the need for further surgery. Also in April, 2009, DR. B denied the request for a bone growth stimulator, citing no evidence of the need for a bone growth stimulator. DR. J requested reconsideration of the bone growth stimulator, indicating that the claimant had a multilevel fusion and there was a high incidence of fusion failure. DR. D reviewed and denied the request. DR. D was unclear why the request was being made five months post-surgery, citing the lack of documentation of a failed fusion. The IRO reviewer, a physical medicine and rehabilitation specialist, upheld the carrier's denial of the requested bone growth stimulator. The reviewer noted that the requested bone growth stimulator was not warranted and did not meet the ODG criteria. Again, there was no objective evidence by diagnostic testing to support the need for the bone growth stimulator. An Independent Medical Evaluation was performed by DR. X, M.D. He noted that he believed the claimant could benefit from a bone stimulator; however, he did not present evidence-based medicine to controvert the opinion of the IRO reviewer.

**DISCUSSION**

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 ODG. Also, in accordance with Division Rule 133.208 (t), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

On the date of this medical contested case hearing, the ODG provides the following with regard to a bone growth stimulator:

Under study. There is conflicting evidence, so case by case recommendations are necessary (some RCTs with efficacy for high risk cases). Some limited evidence exists for improving the fusion rate of spinal fusion surgery in high risk cases (e.g., revision pseudoarthrosis, instability, smoker). (Mooney, 1990) (Marks, 2000) (Akai, 2002) (Simmons, 2004) There is no consistent medical evidence to support or refute use of these devices for improving patient outcomes; there may be a beneficial effect on fusion rates in patients at "high risk", but this has not been convincingly demonstrated. (Resnick, 2005) Also see Fusion for limited number of indications for spinal fusion surgery. See Knee & Leg Chapter for more information on use of Bone-growth stimulators for long bone fractures, where they are recommended for certain conditions.

Criteria for use for invasive or non-invasive electrical bone growth stimulators:

Either invasive or noninvasive methods of electrical bone growth stimulation may be considered medically necessary as an adjunct to spinal fusion surgery for patients with any of the following risk factors for failed fusion: (1) One or more previous failed spinal fusion(s); (2) Grade III or worse spondylolisthesis; (3) Fusion to be performed at more than one level; (4) Current smoking habit (Note: Other tobacco use such as chewing tobacco is not considered a risk factor); (5) Diabetes, Renal disease, Alcoholism; or (6) Significant osteoporosis which has been demonstrated on radiographs. (Kucharzyk, 1999) (Rogozinski, 1996) (Hodges, 2003)

Based on a careful review of the evidence presented in the hearing, the claimant failed to meet his burden of overcoming the IRO decision by a preponderance of the evidence-based medicine. The preponderance of the evidence-based medicine is not contrary to the decision of the IRO and, consequently, the claimant is not entitled to the proposed spinal logic bone growth stimulator.

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 Workers' Compensation Division of the Texas Department of Insurance.
  - B. On \_\_\_\_\_, the claimant was the employee of (Employer).
  - C. On \_\_\_\_\_, the claimant sustained a compensable injury.
2. The carrier delivered to the claimant a single document stating the true corporate name of the carrier, and the name and street address of the carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. (Independent Review Organization) was appointed to act as Independent Review Organization by the Texas Department of Insurance.
4. The IRO determined that the claimant was not entitled to a spinal logic bone growth stimulator.
5. A spinal logic bone growth stimulator is not health care reasonably required for the compensable injury of \_\_\_\_\_.

### **CONCLUSIONS OF LAW**

1. The Workers' Compensation Division of the Texas Department of Insurance 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 spinal logic bone growth stimulator is not health care reasonably required for the compensable injury of \_\_\_\_\_.

### **DECISION**

The claimant is not entitled to a spinal logic bone growth stimulator.

**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 **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, SUITE 300  
IRVING, TEXAS 75063-2732**

Signed this 3rd day of September, 2009.

Carolyn Cheu  
Hearing Officer