

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 26, 2009, 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 outpatient right shoulder rotator cuff repair, inferior capsular shift, possible SLAP II labral repair for the compensable injury of _____?

The record closed on November 9, 2009, after parties had submitted briefs.

PARTIES PRESENT

Petitioner/Subclaimant appeared and represented by Dr. S, M.D. Claimant appeared and was assisted by JS, ombudsman. Respondent/Carrier appeared and was represented by RJ, attorney.

BACKGROUND INFORMATION

Claimant and Dr. S, an orthopedic surgeon, testified at the October 26, 2009, contested case hearing (CCH). Claimant is currently about 53-years-old, and was injured at work on _____, while employed as a truck driver in the oil fields. On _____, while at a disposal site, Claimant felt a pop in his right shoulder when he went to pull a 4-inch diameter hose from its rack. On August 29, 2008, Claimant underwent an arthroscopic Bankhart repair of a torn labrum, subacromial decompression and debridement of the glenoid labrum with total synovectomy of the right shoulder.

Dr. S testified that he had first examined Claimant on November 24, 2008. Claimant was complaining of a damaged nerve where he had a constant burning sensation in his right forearm from the elbow to his hand after right shoulder surgery scope by Dr. R in (City). As of November 24, 2008, Dr. S' assessment was "radicular forearm symptoms, post-op from right shoulder arthroscopy, and to rule out peripheral neuropathy versus cervical radiculopathy."

On May 19, 2009, Dr. S requested preauthorization for "Outpatient Right Shoulder Rotator Cuff Repair, Inferior Capsular Shift, and Possible SLAP II Labral Repair." On July 9, 2009, an IRO upheld denial of the requested procedures.

Dr. S provided credible testimony that the MR arthrogram of February 20, 2009, diagnosed a partial rotator cuff repair. However, Dr. S did not provide any testimony that the ODG criteria for partial rotator cuff repair had been met. Dr. S testified that the conservative care criterion had not been complied with and that he had not really muscle-tested him because it was too painful. Dr. S's evidence was not sufficiently persuasive to overcome the IRO's decision.

With regard to the SLAP II labral repair the ODG provides:

Surgery for SLAP lesions

Recommended for Type II lesions, and for Type IV lesions if more than 50% of the tendon is involved. See SLAP lesion diagnosis. The advent of shoulder arthroscopy, as well as our improved understanding of shoulder anatomy and biomechanics, has led to the identification of previously undiagnosed lesions involving the superior labrum and biceps tendon anchor. Although the history and physical examinations as well as improved imaging modalities (arthro-MRI, arthro-CT) are extremely important in understanding the pathology, the definitive diagnosis of superior labrum anterior to posterior (SLAP) lesions is accomplished through diagnostic arthroscopy. Treatment of these lesions is directed according to the type of SLAP lesion. Generally, type I and type III lesions did not need any treatment or are debrided, whereas type II and many type IV lesions are repaired. (Nam, 2003) (Pujol, 2006) (Wheless, 2007)

Under "Findings," the February 20, 2009, MR arthrogram reads:

There is no evidence of rotator cuff tear. There is thickening and some linear signal in the supraspinatus tendon consistent with tendinopathy. There is slight increased signal and minimal fraying in the subscapularis muscle near the insertion consistent with partial tear. There is an irregular abnormal appearance of the posterior superior labrum at the biceps anchor complex consistent with a SLAP II tear. The anterior labrum appears deficient superiorly, which can be seen as a normal variant. A sublabral foramen is seen, a normal variant. There is evidence of previous surgery in the anterior glenoid with anchor or suture defects in the anterior glenoid. The middle glenohumeral ligament is not visualized and I suspect disrupted. The remainder of the marrow has a normal appearance. The biceps tendon is intact. No additional abnormality is detected.

Dr. S explained that inferior capsular shift is not the same as impingement syndrome; it is completely different because, "...it is if you have a ball in the socket joint and if there is like saran wrap surrounding it to keep it stable and it is no longer continuous around that joint ; it is a weak spot of the joint and that part of the stabilizing structure is stretched out or torn so that it can't provide stability to the joint since it is loose, and in the procedure you cut the structure and overlap the edges and re-sew it." Dr. S testified that he had not looked at the ODG to see if such a procedure was covered.

The ODG makes no mention or provision for inferior capsular shift. Dr. S did not provide any authoritative studies and did not demonstrate how Claimant would fit within any of these studies. Dr. S's evidence was not sufficiently persuasive to overcome the IRO's decision.

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. The Commissioner of the Division of Workers' compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused, and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

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 133.308 (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."

The Claimant suggested that the hearing officer should overturn the IRO decision with regard to 1) outpatient right shoulder rotator cuff repair and 3) possible SLAP II labral repair. Rule 134.600 prohibits a Carrier from modifying a pre-authorization request in any way without the Provider's written and express approval. Pursuant to 28 Texas Administrative Code 135.600 (n), the Carrier shall not condition an approval or change any elements of the preauthorization request unless the condition is mutually agreed to by the health care provider and Carrier and is documented. No persuasive argument or precedent was presented that would allow the hearing officer to carve out one or two procedures from the three requested procedures and order Carrier to pay for it.

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), and 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. Outpatient right shoulder rotator cuff repair, inferior capsular shift, and possible SLAP II labral repair 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 right shoulder rotator cuff repair, inferior capsular shift, and possible SLAP II labral repair is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to outpatient right shoulder rotator cuff repair, inferior capsular shift, and possible SLAP II labral repair 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 **LIBERTY INSURANCE CORPORATION**, and the name and address of its registered agent for service of process is:

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET #1050
AUSTIN, TEXAS 78701**

Signed this 10th day of November, 2009

Cheryl Dean
Hearing Officer