

**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 November 5, 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 a DME power wheelchair and a gallon of DME Bio-Freeze Gel A4260 for the compensable injury of \_\_\_\_\_?

**PARTIES PRESENT**

Petitioner/Claimant appeared and was represented by AR, attorney.  
Respondent/Carrier appeared and was represented by BJ, attorney.

**BACKGROUND INFORMATION**

The claimant sustained a compensable injury to the lumbar spine for which she underwent a laminectomy on August 15, 2007 at the L4-S1 levels. A lumbar MRI undertaken on March 2009 reportedly showed some left sided lateral epidural fibrosis at the L4-L5 level with a central bulge at the L3-L4 level and protrusions at the L5-S1 level. The medical records from the treating doctor document reported bilateral symptoms with a left foot drop and some weakness in the left hip flexor. These medical records note that the claimant cannot walk more than 30 feet with a walker due to pain and has a wheelchair, but requires someone to push her. Bio-Freeze was requested due to the claimant's claim that it helped reduce her pain and thereby, the need for oral medication. The Independent Review Organization (IRO) reviewed the medical records and found no documentation of a peripheral neuropathy, severe cardiac or pulmonary disorder or upper extremity neuromuscular disorder that would prevent the claimant from operating a wheelchair or a walker. The IRO noted that Bio-Freeze was not listed as an approved topical pain reducing agent even under the herbal topical agent list of the Official Disability Guidelines (ODG).

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 ODG states that it does not recommend power mobility devices if the functional mobility device can be sufficiently resolved by the prescription of a cane or walker, or the patient has sufficient upper extremity function to propel a manual wheelchair, or there is a caregiver who is available, willing and able to provide assistance with a manual wheelchair. Early exercise mobilization and independence is encouraged at all steps of the injury recovery process and if there is any mobility with canes or other assistive devices, a motorized scooter is not essential to care. The ODG lists some herbal topical agents that have proven their efficacy to some extent, but does not even list Bio-Freeze Gel as a topical herbal agent for the relief of pain.

The claimant's treating doctor testified that the claimant cannot propel herself in her wheelchair as she sustained an unrelated injury to the right upper extremity in March 2009, but that as it was an unrelated injury, he has not been able to undertake any diagnostic testing for that body part. When asked, the treating doctor noted that he had not evaluated the claimant nor made any clinical findings regarding that injury. The treating doctor's medical records are devoid of any diagnosis regarding the right upper extremity although in one record he does mention that the claimant has trouble elevating herself from a toilet seat. The claimant testified that she found relief for about 30 minutes with the use of Bio-Freeze, which she contended helped keep her off of oral medication for that time period. The claimant failed to offer evidence based medical evidence to establish the efficacy of Bio-Freeze and further failed to show that she lacks functional mobility to ambulate with other assistive devices as listed in the ODG.

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. The IRO determined that the requested services were not reasonable and necessary health care for the compensable injury of \_\_\_\_\_.
2. Carrier delivered to Claimant and Provider 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 Petitioner/Claimant did not present evidence based medicine to support the need for a DME power wheelchair.
  4. The Petitioner/Claimant did not present evidence based medicine to support the need for a gallon of Bio-Freeze Gel A4260.
  5. A DME power wheelchair and a gallon of DME Bio-Freeze Gel A4260 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 a DME power wheelchair and a gallon of DME Bio-Freeze Gel A4260 are not health care reasonably required for the compensable injury of \_\_\_\_\_.

#### **DECISION**

Claimant is not entitled to a DME power wheelchair and a gallon of DME Bio-Freeze Gel A4260 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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RON WRIGHT, PRESIDENT  
6210 EAST HIGHWAY 290  
AUSTIN, TEXAS 78723**

Signed this 9th day of November, 2009.  
Virginia Rodríguez-Gómez

Hearing Officer