

**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 February 08, 2010, 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 left knee arthroscopy, chondroplasty, synovectomy and meniscal repair for the compensable injury of \_\_\_\_\_?

Based on Carrier/Respondent's response, the following issue was added as being timely:

2. Did Petitioner/Doctor or Claimant timely file the request for reconsideration of the procedure?

**PARTIES PRESENT**

Claimant appeared and was assisted by EJ, ombudsman. Petitioner Dr. S appeared without representation. Respondent/Carrier appeared and was represented by CM, attorney.

**BACKGROUND INFORMATION**

Claimant's doctor and Petitioner in this case, Dr. S, requested arthroscopic knee surgery for Claimant to repair a probable meniscal tear confirmed through physical examination and seen on MRI. The initial request was denied on June 15, 2009. It was faxed to Dr. S on June 17, 2009. Dr. S filed his request for reconsideration on July 10, 2009.

As for the issue of late filing of a request for reconsideration, an assertion or finding a request for reconsideration is untimely does not deprive the Division of subject matter jurisdiction to decide the disputed issue. The untimeliness of the reconsideration is a defense to the carrier's ultimate liability for the services or bill in question. In this case, Dr. S filed the request for reconsideration with the Carrier one day late. Carrier did not object to the late filing at the time of the filing. Because Carrier did not present evidence of an objection to Claimant filing her request for reconsideration late at the time of the request; because the IRO proceeded with an evaluation and opinion; and because there was no objection to the late filing made until the prehearing conference, Carrier failed to preserve its objection to Claimant's late request for reconsideration. See Appeals Panel Decision No. 030583. (This is distinguished from Appeals Panel Decision No. 042573-s where Claimant filed his request for reconsideration late and Carrier disputed the appointment of an IRO at the time Claimant filed his late reconsideration, thereby finding an IRO doctor should not have been appointed. See Appeals Panel Decision No. 042573-s.) Carrier is not relieved from liability.

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. 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. (Division Rule 133.308(t).)

Under the Official Disability Guidelines in reference to meniscectomy, the following recommendation is made:

ODG Indications for Surgery™ -- Meniscectomy:

Criteria for meniscectomy or meniscus repair (Suggest 2 symptoms and 2 signs to avoid scopes with lower yield, e.g. pain without other symptoms, posterior joint line tenderness that could just signify arthritis, MRI with degenerative tear that is often false positive):

1. Conservative Care: (Not required for locked/blocked knee.) Physical therapy. OR Medication. OR Activity modification. PLUS
2. Subjective Clinical Findings (at least two): Joint pain. OR Swelling. OR Feeling of give way. OR Locking, clicking, or popping. PLUS
3. Objective Clinical Findings (at least two): Positive McMurray's sign. OR Joint line tenderness. OR Effusion. OR Limited range of motion. OR Locking, clicking, or popping. OR Crepitus. PLUS
4. Imaging Clinical Findings: (Not required for locked/blocked knee.) Meniscal tear on MRI. (Washington, 2003)

In this case, Dr. S testified that on December 15, 2008, the medical records note his examination findings of positive medial joint line testing, positive McMurray's testing, and the ACL being intact. This is the lone knee examination recorded in his records. Dr. S testified once he makes his findings he knows they will always be there so he does not record them at every visit. His

later examinations note range of motion and stability are within normal limits. There is no evidence in the record of "Subjective Clinical Findings (at least two): Joint pain. OR Swelling. OR Feeling of give way. OR Locking, clicking, or popping." The only subjective symptom in the record is joint pain. The criteria are an extensive, inclusive list of requirements for the meniscectomy. Dr. S did not provide any additional evidence based medicine to support his position. Based on the evidence presented, Claimant did not meet her burden to present evidence based medicine evidence that is contrary to the IRO's determination that the meniscectomy is not health care reasonably required for the compensable injury of \_\_\_\_\_.

Under the Official Disability Guidelines in reference to knee chondroplasty, the following recommendation is made:

ODG Indications for Surgery<sup>TM</sup> -- Chondroplasty:

Criteria for chondroplasty (shaving or debridement of an articular surface), requiring ALL of the following:

1. Conservative Care: Medication. OR Physical therapy. PLUS
2. Subjective Clinical Findings: Joint pain. AND Swelling. PLUS
3. Objective Clinical Findings: Effusion. OR Crepitus. OR Limited range of motion. PLUS
4. Imaging Clinical Findings: Chondral defect on MRI  
(Washington, 2003) (Hunt, 2002) (Janecki, 1998)

Likewise regarding the requested chondroplasty procedure, there is no evidence in the record indicating "Subjective Clinical Findings: Joint pain. AND Swelling" or "Objective Clinical Findings: Effusion. OR Crepitus. OR Limited range of motion." There are repeated notations of Claimant's knee pain but not swelling, effusion, crepitus or limited range of motion. Likewise the criteria for a chondroplasty are an extensive, inclusive list of requirements. Dr. S did not provide any additional evidence based medicine to support his position. Based on the evidence presented, Claimant did not meet her burden to present evidence based medicine evidence that is contrary to the IRO's determination that the chondroplasty is not health care reasonably required for the compensable injury of \_\_\_\_\_.

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. On \_\_\_\_\_, Claimant sustained a compensable injury.
  - D. The Independent Review Organization determined Claimant should not have left knee arthroscopy, chondroplasty, synovectomy and meniscal repair.

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 initial surgery request was denied on June 15, 2009. The denial was faxed to and received by Dr. S on June 17, 2009.
4. Dr. S filed his request for reconsideration on July 10, 2009.
5. The IRO decision was written on September 08, 2009, and received by the Division on September 08, 2009.
6. Carrier objected to the request for reconsideration because of Dr. S's late request on January 10, 2010, and not at or near the time of Claimant's late request.
7. Left knee arthroscopy, chondroplasty, synovectomy and meniscal 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 left knee arthroscopy, chondroplasty, synovectomy and meniscal repair is not health care reasonably required for the compensable injury of \_\_\_\_\_.
4. Carrier did not timely object to Dr. S not timely filing the request for reconsideration of the knee surgery.

### **DECISION**

Claimant is not entitled to left knee arthroscopy, chondroplasty, synovectomy and meniscal repair for the compensable injury of \_\_\_\_\_. Carrier did not timely object to Dr. S not timely filing the request for reconsideration of the knee surgery.

### **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

**CSC**  
**(STREET ADDRESS)**  
**(CITY), TX (ZIP CODE)**

Signed this 16th day of February, 2010.

KEN WROBEL  
Hearing Officer