

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 September 29, 2010 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to a cervical ESI under fluoroscopy for treatment of the compensable injury of _____?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by LB, ombudsman.
Respondent/Carrier was represented by RJ, attorney.

OFFICIAL NOTICE

Official notice is taken of: The contested case hearing audio recording in Docket Number (Sequence 02) (AM v. Liberty Mutual Fire Insurance). The testimony and oral arguments made in that contested case hearing regarding jurisdiction are incorporated into this Decision and Order to expedite this matter and avoid duplicity.

BACKGROUND INFORMATION

The Claimant sustained a compensable injury to his cervical spine and right upper extremity on _____. Claimant has undergone an MRI of the cervical spine which revealed an annular disc bulge at C4-C5 and a disc protrusion at C5-C6. An EMG/NCV report dated February 19, 2009 revealed findings consistent with bilateral acute and chronic C6 radiculopathy, more severe on the right. Claimant underwent an ESI to the cervical spine in April 2009 performed by Dr. C (1). As a result of that injection, Claimant suffered from a dural puncture requiring an epidural blood patch. Claimant testified that he also suffered from spinal tap migraine headaches subsequent to that injection. Claimant testified that he continued to suffer from neck and upper extremity pain. Claimant changed treating doctors to Dr. C (2) who has recommended the Claimant undergo a series of two cervical ESI's and trigger point injections in conjunction with a physical therapy program. The cervical ESI request was denied by the Carrier and referred to an IRO who upheld the Carrier's denial. The Claimant underwent the injection and the physical therapy subsequent to the IRO's denial and the Claimant testified that his neck pain has improved.

The IRO reviewer, board certified in anesthesiology and pain management, upheld the previous adverse determination noting that, since the Claimant received a previous ESI for his pain, this request would be considered a request for a therapeutic ESI. The IRO reviewer cited the ODG

(Official Disability Guidelines) which states, "In the therapeutic phase, repeat blocks should only be offered if there is at least 50% pain relief for six to eight weeks." The IRO reviewer concluded noting that these results were not documented and, therefore, without knowing the results from the previous ESI, the reviewer finds that medical necessity does not exist at this time for a cervical ESI under fluoroscopy. The IRO reviewer also noted the discrepancies in the physical exam findings regarding the specific dermatome and two point discrimination test and that there was no cord compression or neuroforaminal stenosis seen on the MRI.

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 making decisions for the care of individual patients. 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."

ODG Criteria for the use of epidural steroid injections, therapeutic:

Note: The purpose of ESI is to reduce pain and inflammation, thereby facilitating progress in more active treatment programs, and avoiding surgery, but this treatment alone offers no significant long-term functional benefit.

- (1) Radiculopathy must be documented by physical examination and corroborated by imaging studies and/or electrodiagnostic testing.
- (2) Initially unresponsive to conservative treatment (exercises, physical methods, NSAIDs and muscle relaxants).
- (3) Injections should be performed using fluoroscopy (live x-ray) for guidance

- (4) If used for diagnostic purposes, a maximum of two injections should be performed. A second block is not recommended if there is inadequate response to the first block. Diagnostic blocks should be at an interval of at least one to two weeks between injections.
- (5) No more than two nerve root levels should be injected using transforaminal blocks.
- (6) No more than one interlaminar level should be injected at one session.
- (7) In the therapeutic phase, repeat blocks should only be offered if there is at least 50% pain relief for six to eight weeks, with a general recommendation of no more than 4 blocks per region per year.
- (8) Repeat injections should be based on continued objective documented pain and function response.
- (9) Current research does not support a “series-of-three” injections in either the diagnostic or therapeutic phase. We recommend no more than 2 ESI injections.
- (10) It is currently not recommended to perform epidural blocks on the same day of treatment as facet blocks or stellate ganglion blocks or sympathetic blocks or trigger point injections as this may lead to improper diagnosis or unnecessary treatment.
- (11) Cervical and lumbar epidural steroid injection should not be performed on the same day.

In response to the IRO, Dr. C (2) provided a letter dated August 16, 2010 explaining that the Claimant did meet the ODG criteria for an ESI to the cervical spine. Dr. C (2) noted that the reason that there was no documentation of the effectiveness of the initial injection was due to the fact that the injection was done incorrectly and resulted in a dural puncture. Dr. C (2) addressed each criteria in the ODG for ESI's. Dr. C (2) noted that the Claimant does have documented radiculopathy, by clinical examination and EMG. Dr. C (2) stated that the Claimant has been on several medications with minimal and short term relief and that he did undergo physical therapy in the past but not active physical therapy, only heat and massage. Dr. C (2) went onto address the rest of the criteria in the ODG and noted that additional ESI's would only be requested if the Claimant meets the ODG at that time. Although Dr. C (2) opines that the Claimant meets the ODG criteria for the ESI to the cervical spine, the IRO reviewed the same medical records that Dr. C (2) refers to in his response. Dr. C (2) offered no additional information or explanation of the Claimant's medical records contrary to the documentation reviewed by the IRO with the exception of the complications the Claimant experienced as a result of the initial ESI. That addressed only one aspect of the criteria for a subsequent ESI. Based on the evidence presented, the Claimant did not meet his burden to present evidence based medicine evidence contrary to the IRO's determination.

Carrier made the argument that jurisdiction of this appeal would be proper before the State Office of Administrative Hearings (SOAH) rather than the Division of Workers' Compensation. It is undisputed that the procedure in dispute at this hearing was performed after the IRO determination and that the cost exceeded \$3,000.00. The Carrier argued that the requested procedure was not preauthorized; therefore, no dispute remained for adjudication. Carrier argued that, since the provider rendered the service requiring preauthorization prior to receiving preauthorization, the dispute is moot and the Division cannot preauthorize a service that has already been performed. The Carrier argued that this case is now a retrospective medical review in excess of \$3,000.00 and that the proper venue lies with SOAH. Carrier's motion to dismiss was denied. The procedure in dispute had not been performed at the time of the review by the IRO that determines whether a concurrent/prospective review or a retrospective review is involved. Accordingly, under Texas Labor Code 413.0311 review is proper by the Division.

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) when he 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. The Claimant failed to prove that he meets all the requirements in the ODG for a cervical ESI under fluoroscopy and the requested procedure is not consistent with the recommendations in the ODG.
4. A cervical ESI under fluoroscopy is not health care reasonably required for the compensable injury of _____.
5. The proceeding is an appeal of an IRO decision involving determination of a concurrent or prospective medical necessity for a health care service.

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 cervical ESI under fluoroscopy is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to a cervical ESI under fluoroscopy 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 MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is:

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET SUITE 620
AUSTIN, TX 78701-3218**

Signed this 29th day of September, 2010.

Carol A. Fougerat
Hearing Officer