

MEDICAL CONTESTED CASE HEARING NO 11169  
M6-11-33774-01

**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 June 29, 2011, 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 24-hour home caregiver/caretaker services to be performed by Claimant's sister, LW, for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

Petitioner/Claimant appeared and was represented by PR, attorney. Respondent/Carrier appeared and was represented by PM, attorney.

**BACKGROUND INFORMATION**

Claimant, an associate, fell off a ladder on (Date of Injury), and sustained a compensable injury. According to the medical records, Claimant received medical treatment for a traumatic brain injury as a result of the incident, has been confined to a wheelchair after his injury, is homebound, and requires 24-hour home healthcare services for seven days per week. Claimant was placed in a long-term nursing home in October 2009. In November 2009, Claimant's family requested that Claimant be moved from the nursing home to his mother's home. On March 25, 2010, (Home Healthcare Provider) initiated a home health service plan wherein (Home Healthcare Provider) agreed to provide Claimant a 24-hour home healthcare service for seven days per week or 168 hours per week. The (Home Healthcare Provider) service plan provided that (Home Healthcare Provider) would include bathing, dressing, exercise, feeding, grooming, routine hair and skin care, toileting, transferring from wheelchair to the bed and toilet, walking, cleaning, laundry, meal preparation, escorting, shopping, and assisting Claimant with the prescribed medical treatment plan and self-administered medications. The (Home Healthcare Provider) service plan further provided that (Home Healthcare Provider) would provide the necessary personal care attendants (attendants) to perform the 24-hour home healthcare service for seven days per week, and the attendants were under the supervision of a (Home Healthcare Provider) registered nurse. Dr. P, M.D., became Claimant's treating doctor in 2010. On June 24,

2010, Dr. P opined that Claimant did not have the mental capacity to live independently, and should live in a nursing home or similar setting where he could receive 24-hour supervision for seven days per week. Dr. P opined on September 10, 2010, that Claimant could remain in his home environment provided he received full-time care.

Claimant requested that his sister, LW, provide the 24-hour home caregiver/caretaker services. Carrier denied Claimant's request and Claimant requested an IRO review of Carrier's denial. The IRO reviewer was identified as a medical doctor who was board certified in physical medicine and rehabilitation, and practiced medicine for more than ten years. The IRO reviewer upheld Carrier's denial and determined that the 24-hour home healthcare services to be performed by Claimant's sister, LW, was not health care reasonably required for Claimant's compensable injury, and that the request did not meet the recommendations and guidelines of the Official Disability Guidelines (ODG). The IRO reviewer noted that the ODG limits the medical care to no more than 35 hours per week, and that the request for a 24-hour home caregiver/caretaker services requested by Ms. LW was not supported by the ODG. The IRO reviewer further noted that Ms. LW did not provide documentation that she either owned or was employed by a home healthcare service or agency nor did she provide documentation that she had been trained as a medication aide or currently holds a certification as such. The IRO reviewer further noted that Ms. LW did not provide documentation that she was working under a registered nurse in compliance with Rule 224.8 of the Texas Board of Nursing rules.

## **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 making decisions about 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 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."

With regard to a home health services, the current edition of the ODG provides:

“Recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time or “intermittent” basis, generally up to no more than 35 hours per week. Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed. (CMS, 2004)”

Claimant appealed the IRO decision. Ms. LW testified that she moved into the home with her mother and Claimant, and desired to take care of Claimant. Ms. LW further testified that she became a certified nurse’s assistant in October 2010, and indicated that she was not employed or under the supervision of a registered nurse. Ms. LW explained that her family, including her mother and Claimant, had privacy issues with the attendants from (Home Healthcare Provider) being in their home, and that Claimant was embarrassed to have the attendants taking care of his personal hygiene. Dr. C, M.D., testified on behalf of Claimant, and indicated that he was board certified as a physical medicine and rehabilitation specialist. Dr. C further testified that he had conducted one interview with Claimant, reviewed medical records provided by Claimant’s attorney, and determined that Claimant required a full-time and supervised 24-hour health care program over a seven day period. Dr. C explained that there were technical and legal implications that would have to be considered concerning Claimant’s medical treatment plan. Dr. C stated that Claimant’s medical treatment would require that his treating doctor prepare a medical treatment plan, and that the medical treatment plan would be implemented under the supervision of a registered nurse. Dr. C further explained that the registered nurse would then direct and supervise the administering of the medical treatment plan through nursing staff working through a home health agency or working directly under the supervision of the registered nurse. Dr. C stated that Ms. LW could provide Claimant the prescribed medical treatment, including prescribed medications, but she would have to have the appropriate supervision. Ms. M testified that she was a registered nurse with (Home Healthcare Provider), and supervised the attendants with (Home Healthcare Provider). Ms. M further testified that she

made visits to Claimant's home, and would address health care issues that Claimant had concerning the services being provided by (Home Healthcare Provider). Ms. M stated that the attendants under her supervision were certified nurse's assistants.

Based on the evidence presented, Claimant did not meet his burden of proof of overcoming the IRO decision by a preponderance of evidence-based medical evidence. There was no objection to the testimony, reports, or qualifications of any doctor or witness.

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 (Date of Injury), Claimant was the employee of (Self-Insured), Employer.
  - C. On (Date of Injury), Employer provided workers' compensation insurance as a Self-Insurer.
  - D. Claimant sustained a compensable injury on (Date of Injury).
  - E. The IRO determined that Claimant is not entitled to a 24-hour home caregiver/caretaker services to be performed by Claimant's sister, LW, for the compensable injury of (Date of Injury).
  - F. Currently, Claimant is entitled to 16 hours of caregiver/caretaker services per day for the compensable injury of (Date of Injury).
  - G. If it is determined that Claimant's sister, LW, is an appropriate caregiver/caretaker for any and or all portions of the 16 hours per day for the compensable injury of (Date of Injury), then and in that event, Carrier is relieved of any and all requirements to employ a home health care agency for these hours.
2. Carrier delivered to Petitioner/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 24-hour home caregiver/caretaker services to be performed by Claimant's sister, LW, is not health care reasonably required for the compensable injury of (Date of Injury).

### **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 Independent Review Organization (IRO) that 24-hour home caregiver/caretaker services to be performed by Claimant's sister, LW, is not health care reasonably required for the compensable injury of (Date of Injury).

### **DECISION**

Claimant is not entitled to 24-hour home caregiver/caretaker services to be performed by Claimant's sister, LW, for the compensable injury of (Date of Injury).

### **ORDER**

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury of (Date of Injury), in accordance with Texas Labor Code Ann. §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

**(SELF-INSURED)  
STREET ADDRESS  
(CITY), TEXAS (ZIP CODE)**

Signed this 22nd day of July, 2011.

Wes Peyton  
Hearing Officer