

MEDICAL CONTESTED CASE HEARING NO 12061  
M6-12-36740-01

**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 January 5, 2012 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 entitled to open left shoulder rotator cuff repair and the use of tendon graft for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

Petitioner/Carrier appeared and was represented by TS, attorney. Respondent/Provider, Dr. KB, appeared on his own behalf by telephone. Claimant appeared and was represented by TP, attorney. Also present was GT on behalf of the Employer.

**BACKGROUND INFORMATION**

The Claimant sustained a compensable left shoulder injury on (Date of Injury) while working for Brock Services, Inc. The Claimant's treating doctor, Dr. GM, eventually referred the Claimant to Dr. KB, who is a board certified orthopedic surgeon. Dr. B diagnosed the Claimant with a full thickness tear of the rotator cuff of his left shoulder. On March 10, 2010, Dr. B performed an open rotator cuff repair surgery on the Claimant's left shoulder. Thereafter, the sutures placed during that surgery eventually tore out of the tendon, which led to a revision surgery performed on May 11, 2011 due to a recurrent tear of the rotator cuff. Subsequently, the Claimant appeared to heal but later developed more symptoms, and an MR arthrogram performed on July 13, 2011 showed the recurrence of the retraction of the Claimant's supraspinatus tendon in his left shoulder. Essentially, the sutures placed during the May 11, 2011 surgery failed, according to Dr. B's testimony. This led Dr. B to request the procedure at issue herein.

Dr. B's request was denied by the Carrier's first utilization review agent (URA), who is also a board certified orthopedic surgeon. On reconsideration, the Carrier's second URA, also a board certified orthopedic surgeon, approved the surgery but denied the use of a tendon graft. On this basis, the parties stipulated at the hearing that the open rotator cuff repair of the left shoulder is medically necessary for the compensable (Date of Injury) injury, but the use of the tendon graft

remains in dispute. The URA denials referred to above were overturned by an IRO. The IRO physician reviewer, who is also a board certified orthopedic surgeon, reasoned that while the use of tendon grafts is under study per the Official Disability Guidelines (ODG), the use of such grafts is commonplace in certain instances, including for patients who have suffered recurrent tears because of the failure of the anchor. The IRO stated that in such instances, a request for an open rotator cuff repair and tendon graft falls within the standards of care and generally accepted guidelines for the medical treatment of the condition.

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 [is] considered [a party] 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 addresses the medical necessity of a graft for a rotator cuff repair as follows:

Under study. Over the past few years, many biologic patches have been developed to augment repairs of large or complex rotator cuff tendon tears. These patches

include both allograft and xenografts. Regardless of their origins, these products are primarily composed of purified type I collagen. There is a lack of studies demonstrating which ones are effective. (Coons, 2006) For short-term periods, restoring a massive rotator cuff tendon defect with synthetic grafts can give significant pain relief, but there is still some risk of new tears. (Audenaert, 2006)

The Carrier presented the testimony of a board certified orthopedic surgeon, Dr. JH, who admittedly has not performed a rotator cuff repair since 1995. Dr. B's testimony shows that tendon grafts were not in use 17 years ago. Dr. H's opinion is that the use of a tendon graft for a massive tear of the rotator cuff would be medically appropriate, but in his opinion, based on his review of the Claimant's records, the procedure is not warranted in this case. Dr. B's testimony was helpful and persuasive, as was the analysis in the IRO decision. The Carrier did not meet its burden of proof to establish that the preponderance of the evidence-based medical evidence is contrary to the IRO decision. For this reason, the Claimant is entitled to an open left shoulder rotator cuff repair and use of tendon graft for treatment of his compensable (Date of Injury) injury.

Even though all the evidence presented may not have been discussed in detail, 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 was proper in the Dr. B's Office of the Texas Department of Insurance, Division of Workers' Compensation.
  - B. On (Date of Injury), Claimant was the employee of (Employer), Employer.
  - C. On (Date of Injury), Employer had workers' compensation insurance coverage with Zurich American Insurance Co., Carrier.
  - D. The Claimant sustained a compensable left shoulder injury on (Date of Injury) while in the course and scope of his employment with (Employer).
  - E. The open left shoulder rotator cuff repair is treatment that is medically necessary for the Claimant's compensable (Date of Injury) injury.
2. The use of tendon graft in conjunction with an open left shoulder rotator cuff repair is health care reasonably required for the Claimant's compensable (Date of Injury) injury.
3. The Carrier delivered to Claimant a single document stating the true corporate name of the Carrier, and the name and address of the Carrier's registered agent, which was admitted into evidence as Hearing Officer's Exhibit Number 1.

## CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue was proper in the Dr. B's Office.
3. Per the parties' stipulation, open left shoulder rotator cuff repair is health care reasonably required for the Claimant's compensable injury of (Date of Injury).
4. The preponderance of the evidence is not contrary to the decision of the IRO that the use of tendon graft in conjunction with an open left shoulder rotator cuff repair is health care reasonably required for the Claimant's compensable injury of (Date of Injury).

## DECISION

The Claimant is entitled to open left shoulder rotator cuff repair and use of tendon graft for the compensable injury of (Date of Injury).

## ORDER

The Carrier is **ORDERED** to pay medical benefits in accordance with this decision, the Act and the implementing Rules.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY**, and the name and address of its registered agent for service of process is:

**LEO F. MALO  
12222 MERIT DRIVE, STE. 700  
DALLAS, TX 75251**

Signed this 23rd day of January, 2012.

Patrice Fleming-Squirewell  
Hearing Officer