

MEDICAL CONTESTED CASE HEARING NO 12075
M6-12-37586-01

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.

ISSUE

A medical contested case hearing was held on February 9, 2012, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (hereinafter "IRO") that Claimant is not entitled to triple arthrodesis right foot for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner / Claimant appeared and was assisted by MW, ombudsman. Respondent / Carrier appeared and was represented by CA, attorney.

BACKGROUND INFORMATION

On (Date of Injury), Petitioner / Claimant worked for the employer, (Employer), and sustained an injury to his right foot. He received medical treatment for his injuries and was seen by Dr. C, M.D., on several occasions. Eventually, a request for triple arthrodesis of the right foot was proposed. Such requested treatment underwent utilization review and was denied on July 22, 2011 by Dr. T, M.D. Reconsideration was requested and such reconsideration was denied on September 19, 2011 by Dr. T (2), M.D. Reconsideration was again requested and such reconsideration was denied on October 11, 2011 by Dr. V, M.D. Petitioner / Claimant then appealed the denials to an IRO and the IRO reviewer upheld the previous adverse determinations. Consequently, Petitioner / Claimant appealed the IRO decision and this is the reason for the present discussion and decision.

DISCUSSION

Medical Necessity

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. TEX. LAB. CODE § 408.021. "Health care reasonably required" is defined 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. TEX. LAB. CODE § 401.011 (22a). Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. "Evidence-based medicine" means 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. TEX. LAB. CODE § 401.011 (18a). 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. TEX. LAB. CODE § 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with the Texas Labor Code. TEX. LAB. CODE § 413.017(1).

In accordance with the above statutory guidance, the Division has adopted treatment guidelines by rule. 28 Tex. Admin. Code § 137.100 (Division Rule 137.100). This Rule directs health care providers to provide treatment in accordance with the current edition of the *Official Disability Guidelines* (hereinafter "ODG") and that 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.

The pertinent provisions of the ODG applicable to this case are as follows, to wit:

Arthrodesis (fusion):

See Fusion.

Fusion (arthrodesis):

Recommended as indicated below. In painful hindfoot osteoarthritis the arthroscopic technique provides reliable fusion and high patient satisfaction with the advantages of a minimally invasive procedure. (Glanzmann, 2007) In stage III and IV adult acquired flatfoot due to posterior tibial tendon dysfunction, correcting and stabilizing arthrodeses are advised. (Kelly, 2001) Also see Surgery for calcaneal fractures; Surgery for posterior tibial tendon ruptures.

ODG Indications for Surgery -- Ankle Fusion:

Criteria for fusion (ankle, tarsal, metatarsal) to treat non- or malunion of a fracture, or traumatic arthritis secondary to on-the-job injury to the affected joint:

1. Conservative Care: Immobilization, which may include: Casting, bracing, shoe modification, or other orthotics. OR Anti-inflammatory medications. PLUS:

2. Subjective Clinical Findings: Pain including that which is aggravated by activity and weight-bearing. AND Relieved by Xylocaine injection. PLUS:

3. Objective Clinical Findings: Malalignment. AND Decreased range of motion. PLUS:

4. Imaging Clinical Findings: Positive x-ray confirming presence of: Loss of articular cartilage (arthritis). OR Bone deformity (hypertrophic spurring, sclerosis). OR Non- or malunion of a fracture. Supportive imaging could include: Bone scan (for arthritis only) to confirm localization. OR Magnetic Resonance Imaging (MRI). OR Tomography.

Procedures Not supported: Intertarsal or subtalar fusion, except for stage 3 or 4 adult acquired flatfoot.

(Washington, 2002) (Kennedy, 2003) (Rockett, 2001) (Raikin, 2003)

For average hospital LOS if criteria are met, see Hospital length of stay (LOS).

In the instant case, the utilization review doctors denied the requested treatment and the IRO reviewer upheld the denial of the requested treatment. The IRO reviewer who is board certified in orthopedic surgery reviewed Petitioner's records and opined that the proposed procedure was not indicated as medically necessary based on the clinical data provided. Thereafter, the IRO reviewer cited medical judgment, clinical experience and expertise in accordance with accepted medical standards and the ODG in upholding the denials of the requested treatment.

When weighing expert testimony, the hearing officer must first determine whether the doctor rendering an expert opinion is qualified to offer such. In addition, the hearing officer must determine whether the opinion is relevant to the issues at bar and whether it is based upon a reliable foundation. An expert's bald assurance of validity is not enough. *See Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *E.I. Du Pont De Nemours and Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. *See Black*, 171 F.3d 308. In determining reliability of the evidence, the hearing officer must consider the evidence in terms of (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *Kelly v. State*, 792 S.W.2d 579 (Tex. App.-Fort Worth 1990) *aff'd*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Additionally, "[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." *See* Division Rule 133.308 (t). "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." *Id.*

Accordingly, Petitioner / Claimant, as the party appealing the IRO decision, had the burden of overcoming the IRO decision by a preponderance of evidence-based medical evidence. Although Petitioner / Claimant presented documentary evidence in the form of his medical records, there was insufficient explanation through the use of evidence-based medical evidence as to how Petitioner / Claimant met the requirements of ODG for the requested treatment. Petitioner / Claimant also did not establish the necessity of the requested treatment at issue through other evidence-based medical evidence. As such, insufficient evidence-based medical evidence existed to overcome the IRO decision. Therefore, the preponderance of the evidence is not contrary to the decision of the IRO that Petitioner / Claimant is not entitled to triple arthrodesis right foot for the compensable injury of (Date of Injury).

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), Petitioner / Claimant was the employee of (Employer), the Employer.
 - C. On (Date of Injury), Employer provided workers' compensation with Zurich American Insurance Company.
 - D. On (Date of Injury), Petitioner / Claimant sustained a compensable injury.
 - E. The IRO determined that Petitioner / Claimant is not entitled to triple arthrodesis right foot for the compensable injury of (Date of Injury).
2. Respondent / Carrier delivered to Petitioner / Claimant a single document stating the true corporate name of Respondent / Carrier, and the name and street address of Respondent / Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. Triple arthrodesis right foot 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 IRO that Petitioner / Claimant is not entitled to triple arthrodesis right foot for the compensable injury of (Date of Injury).

DECISION

Petitioner / Claimant is not entitled to triple arthrodesis right foot for the compensable injury of (Date of Injury).

ORDER

Respondent / Carrier is not liable for the benefits at issue in this hearing. Petitioner / Claimant remains entitled to medical benefits for the compensable injury in accordance with § 408.021.

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TX 78701-3232**

Signed this 15th day of February, 2012.

Julio Gomez, Jr.
Hearing Officer