

MEDICAL CONTESTED CASE HEARING NO 12081
M6-12-37961-01

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 February 14, 2012 with the record closing on February 28, 2012 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that the Claimant is not entitled to orthopedic shoes and 1 inch elevation for the left and right foot for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by MH, ombudsman.
Respondent/Carrier appeared and was represented by SB, attorney.

BACKGROUND INFORMATION

A contested case hearing was held on February 14, 2012. After the conclusion of the hearing, the doctor contacted the ombudsman indicating that he was willing and able to testify on behalf of Claimant. Claimant requested that the record be re-opened to allow the doctor to testify. There was no objection from the Carrier and the Hearing Officer granted the request. Testimony was taken from the doctor on February 28, 2012 and the record was closed.

Claimant sustained a compensable injury on (Date of Injury). Claimant developed an infection in the lower extremities related to a prior necrotizing fasciitis. Claimant has undergone multiple (possibly 25) surgeries resulting from his injury and infections and has been wearing orthopedic shoes for his bilateral lower extremity injury for over 10 years. Claimant requires new orthopedic shoes with inserts approximately two or three times a year depending on how quickly the shoes wear out. Claimant's treating doctor, Dr. H, has recommended that Claimant receive new orthopedic shoes and one inch elevation inserts for treatment of his compensable injury. The request for new orthopedic shoes and one inch elevation for the left and right foot was denied by the Carrier and submitted to an IRO who upheld the Carrier's denial.

The IRO reviewer, identified as a board certified orthopedic surgeon, determined that the documentation submitted for this review did not support the request at this time. The IRO reviewer noted that the Official Disability Guidelines (ODG) recommend foot orthotics provided the employee meets specific criteria to include findings of plantar fasciitis or foot pain related to rheumatoid arthritis or hallux valgus. The IRO reviewer stated that the employee's [Claimant] complaints of foot pain appear to be directly related to the surgical interventions as well as the necrotizing fasciitis; however that there was no mention in the clinical notes regarding the employee's hallux valgus. The IRO reviewer concluded by stating that, given the lack of significant clinical findings involving the employee's foot/ankle, this request does not meet the guideline [ODG] recommendations.

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."

ODG recommendations for orthotics:

Recommended for plantar fasciitis and for foot pain in rheumatoid arthritis. See also Prostheses (artificial limb). Both prefabricated and custom orthotic devices are recommended for plantar heel pain (plantar fasciitis, plantar fasciitis, heel spur syndrome). (Thomas, 2010) Orthoses should be cautiously prescribed in treating plantar heel pain for those patients who stand for long periods; stretching exercises and heel pads are associated with better outcomes than custom made orthoses in people who stand for more than eight hours per day. (Crawford, 2003) As part of the initial treatment of proximal plantar fasciitis, when used in conjunction with a stretching program, a prefabricated shoe insert is more likely to produce improvement in symptoms than a custom polypropylene orthotic device or stretching alone. The percentages improved in each group were: (1) silicone insert, 95%; (2) rubber insert, 88%; (3) felt insert, 81%; (4) Achilles tendon and plantar fascia stretching only, 72%; and (5) custom orthosis, 68%. (Pfeffer, 1999) Evidence indicates mechanical treatment with taping and orthoses to be more effective than either anti-inflammatory or accommodative modalities in the treatment of plantar fasciitis. (Lynch, 1998) (Gross, 2002) For ankle sprains, the use of an elastic bandage has fewer complications than taping but appears to be associated with a slower return to work, and more reported instability than a semi-rigid ankle support. Lace-up ankle support appears effective in reducing swelling in the short-term compared with semi-rigid ankle support, elastic bandage and tape. (Kerkhoffs, 2002) For hallux valgus the evidence suggests that orthoses and night splints do not appear to be any more beneficial in improving outcomes than no treatment. (Ferrari-Cochrane, 2004) Semirigid foot orthotics appear to be more effective than supportive shoes worn alone or worn with soft orthoses for metatarsalgia. (Chalmers, 2000) The use of shock absorbing inserts in footwear probably reduces the incidence of stress fractures. There is insufficient evidence to determine the best design of such inserts but comfort and tolerability should be considered. Rehabilitation after tibial stress fracture may be aided by the use of pneumatic bracing but more evidence is required to confirm this. (Rome-Cochrane, 2005) Foot orthoses produce small short-term benefits in function and may also produce small reductions in pain for people with plantar fasciitis, but they do not have long-term beneficial effects compared with a sham device. The customized and prefabricated orthoses used in this trial have similar effectiveness in the treatment of plantar fasciitis. (Landorf, 2006) Eleven trials involving 1332 participants were included in this meta-analysis: five trials evaluated custom-made foot orthoses for plantar fasciitis (691 participants); three for foot pain in rheumatoid arthritis (231 participants); and one for hallux valgus (209 participants). Custom-made foot orthoses were effective for rearfoot pain in rheumatoid arthritis (NNT:4) and

painful hallux valgus (NNT:6); however, surgery was even more effective for hallux valgus. It is unclear if custom-made foot orthoses were effective for plantar fasciitis or metatarsophalangeal joint pain in rheumatoid arthritis. (Hawke, 2008) Rocker profile shoes are commonly prescribed based on theoretical considerations with minimal scientific study and validation. Rocker profiles are used to afford pressure relief for the plantar surface of the foot, to limit the need for sagittal plane motion in the joints of the foot and to alter gait kinetics and kinematics in proximal joints. In this review, efficacy has not been demonstrated. The effectiveness of rocker-soled shoes in restricting sagittal plane motion in individual joints of the foot is unclear. Rocker profiles have minimal effect on the kinetics and kinematics of the more proximal joints of the lower limb, but more significant effects are seen at the ankle. (Hutchins, 2009) According to this systematic review of treatment for ankle sprains, pneumatic braces provide beneficial ankle support and may prevent subsequent sprains during high-risk sporting activity. (Seah, 2011) Outcomes from using a custom orthosis are highly variable and dependent on the skill of the fabricator and the material used. A trial of a prefabricated orthosis is recommended in the acute phase, but due to diverse anatomical differences many patients will require a custom orthosis for long-term pain control. A pre-fab orthosis may be made of softer material more appropriate in the acute phase, but it may break down with use whereas a custom semi-rigid orthosis may work better over the long term. See also Ankle foot orthosis (AFO).

Dr. H, a board certified orthopedic surgeon, testified that he has been treating Claimant for two decades and that Claimant has required orthopedic shoes in order to have the ability to use his lower extremities in addition to preventing further injury and infection. Dr. H testified that loss of the orthopedic shoes would more than likely result in the loss of Claimant's feet. Dr. H testified that Claimant has only half of his heel bone and no dorsi-flexion. Dr. H testified that Claimant's diabetes predisposes Claimant to ulceration which will occur without the orthopedic shoes. In response to the IRO, Dr. H opined that the ODG does not apply to Claimant's medical condition or need for the orthopedic shoes. Dr. H stated that Claimant does not suffer from plantar fasciitis or hallux valgus, the latter of which he explained was simply bunions. Dr. H testified that Claimant has external fixators from his hips to his feet, does not have his entire left and right foot, Claimant's ankles are "shot," Claimant suffers from muscle damage and weakness due to the multiple infections and that the tibial deformity restricts Claimant's hip rotation which adds to the foot stress. Dr. H testified that his treatment and medical opinions regarding the necessity for orthopedic shoes were based on his experience and training in the field of orthopedic surgery.

Appendix "D" of the ODG documents, in part, exceptions to the ODG. The ODG covers over 99% of medical conditions seen in workers' compensation, but it does not cover many common conditions seen outside of workers' compensation, such as diabetes, cancer, heart disease,

cosmetic surgery, etc. There may be instances where a treatment that is typically not used in the occupational injury arena is indicated for a particular occupational injury. This may be reasonable either based on evidence from the non-occupational injury arena; or in the absence of adequate evidence, a reasonable clinical rationale. In making clinical decisions for conditions not covered by ODG, or for treatments not mentioned in ODG, health care providers should rely on the medical evidence as much as possible. In those situations where the treatment at issue is not addressed in ODG, the health care provider should demonstrate how functional improvement would be the expected result of the treatment. Providers should also document any relevant co-morbidities (if applicable) that may increase the likelihood that this treatment would be appropriate for their patient. In cases where the medical care is an exception to ODG, the health care provider should document: (1) extenuating circumstances of the case that warrant performance of the treatment including the rationale for procedures not addressed in ODG; (2) patient co-morbidities, (3) objective signs of functional improvement for treatment conducted thus far; (4) measurable goals and progress points expected from additional treatment; and (5) additional evidence that supports the health care provider's case.

Appendix "D" of the ODG also provides, in part, that in documenting why their patient may be an exception to the guidelines, providers will want to explain how their patient is different from the ones used in the studies that may have resulted in a negative recommendation or exclusion. Co-morbidities may also require additional treatments beyond ODG recommendations. This will typically involve co-morbidities, for example, obesity, or diabetes that may increase the likelihood that this treatment would be appropriate for their patient. This may also include vocational, recreational and/or other functional factors. There could be specifics of the injury or condition that put the injured worker outside of the type of patients covered in the high quality studies. A significant goal of any medical treatment in the workers' compensation system is to return the patient to his prior level of function to allow injured workers to go back to the life they had prior to injury, including return to work. The provider should demonstrate how this functional improvement would be the expected result of the treatment in this case, either from past experience or from an explanation about the mechanism of injury and the effect of the treatment, and documenting points where this improvement can be measured.

Dr. H testified that, due to the extent of Claimant's injury and resulting infections, Claimant was not expected to ever retain any use of his lower extremities and that Claimant was close to having his legs amputated at the hips. Dr. H testified that Claimant's physical condition as well as his diabetic condition contributes to the necessity of the recommended orthotics. Dr. H explained that the orthotics relieve pressure points which can result in ulceration complicated by Claimant's diabetes. Dr. H also testified that Claimant's obesity, which resulted subsequent to Claimant's injury, further complicates his lower extremity condition and the necessity for orthotics. Dr. H testified, in no uncertain terms, that Claimant requires the orthotics in order to retain not only the use of his lower extremities but to keep from losing the lower extremities to amputation.

Appendix “D” of the ODG also provides, in part, that the process for documenting exceptions to guidelines is supported by medical research. According to a study published in the February 2010 edition of the *Annals of Internal Medicine*, funded by the Agency for Healthcare Research and Quality, exceptions to treatment guidelines that are documented by physicians during their regular workflow and reviewed by peers are appropriate most of the time. Based on the evidence presented, Claimant did provide an expert medical opinion sufficient to contradict the determination of the IRO and the preponderance of the evidence is contrary to the decision of the IRO that the Claimant is not entitled to orthopedic shoes and one inch elevation for the left and 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), Claimant was the employee of (Employer) when he sustained a compensable injury to his lower extremities.
 - C. The IRO reviewer determined that the request for orthopedic shoes and one inch elevation for the left and right foot was not health care reasonably required for the compensable injury of (Date of 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. Claimant’s treating doctor requested new orthopedic shoes and one inch elevation for the left and right foot for the compensable injury of (Date of Injury).
4. Claimant does not meet the requirements of the ODG for orthopedic shoes and one inch elevation for the left and right foot because Claimant’s condition is not covered in the ODG’s recommendation for orthotics.
5. Claimant presented the opinion of Dr. H, a board certified orthopedic surgeon, who provided documentation of extenuating circumstances that warrant the orthotics including the rationale that Claimant’s specific diagnoses which were not addressed in ODG recommendation for orthotics; Claimant’s co-morbidities, objective signs of functional improvement for treatment conducted thus far; and measurable goals and progress points expected from the orthotics.

6. Orthopedic shoes and one inch elevation for the left and right foot is 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 contrary to the decision of the IRO that orthopedic shoes and one inch elevation for the left and right foot is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is entitled to orthopedic shoes and one inch elevation for the left and right foot for the compensable injury of (Date of Injury).

ORDER

Carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules. Accrued but unpaid income benefits, if any, shall be paid in a lump sum together with interest as provided by law.

The true corporate name of the insurance carrier is **FACILITY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is:

**KATHRYN ANN PLEVICH
2801 VIA FORTUNA, SUITE 400
AUSTIN, TX 78746-7567**

Signed this 28th day of February, 2012.

Carol A. Fougerat
Hearing Officer