MEDICAL CONTESTED CASE HEARING NO. 13077

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 March 19, 2013 to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that left L5-left S1 facet injections are not reasonably required health care for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Claimant appeared and was assisted by CM, ombudsman. Petitioner/Provider, KB, MD, appeared as a witness for Claimant. Respondent/Carrier appeared and was represented by JF, attorney.

BACKGROUND INFORMATION

Claimant sustained a compensable low back injury on (Date of Injury), while employed as a derrick and floor hand on a drilling rig operated by (Employer), Employer. KB, MD requested preauthorization for a diagnostic lumbar facet injection at L5-S1 in late September of 2012. Carrier submitted the preauthorization request to its utilization review agent (URA), Medical Review Institute of America. The initial request was reviewed by LG, DO. Dr. G recommended that the request be denied because a lumbar fusion had been recommended prior to Dr. B's request for the facet injection and she interpreted the request as a request for facet injections at two levels. She noted that the CPT code on the request only encompassed a single level.

Dr. B requested reconsideration of the initial denial. The reconsideration request was submitted to Medical Review Institute of America and was reviewed by DT, MD. Dr. T also recommended that the preauthorization for facet injections be denied. He opined that guideline criteria had not been met because the medical records indicated that straight leg raises had elicited pain, there was documentation of a lumbar fusion request, and a concomitant plan for exercise or therapy had not been documented. Carrier again denied the request for preauthorization for the diagnostic facet injection.

Carrier's denial was appealed to an independent review organization in accordance with Rule 133.308. The Department appointed P-IRO Inc. as the independent review organization. In its

report dated December 7, 2012, P-IRO Inc. upheld Carrier's denial of the facet injection. The IRO physician reviewer opined that the request for facet injections was not supported by the clinical information because the imaging studies interpreted by Dr. B showed no objective evidence of facet pathology at L5-S1; Claimant was reported to have lumbar tenderness and to be neurologically intact; there was some suggestion of a subtle radiculopathy on examination and there were multiple indications that surgery had been recommended. The physician reviewer wrote that the recommendation for surgery "in itself would be exclusionary to the performance of lumbar facet injections" and, therefore, Claimant did not meet criteria set forth in the Official Disability Guidelines (ODG) for lumbar facet injections.

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(s), "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 division 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 diagnostic facet injections as follows:

Facet joint diagnostic blocks (injections)

Recommend no more than one set of medial branch diagnostic blocks prior to facet neurotomy, if neurotomy is chosen as an option for treatment (a procedure that is still considered "under study"). Diagnostic blocks may be performed with the anticipation that if successful, treatment may proceed to facet neurotomy at the diagnosed levels. Current research indicates that a minimum of one diagnostic block be performed prior to a neurotomy, and that this be a medial branch block (MBB). Although it is suggested that MBBs and intra-articular blocks appear to provide comparable diagnostic information, the results of placebo-controlled trials of neurotomy found better predictive effect with diagnostic MBBs. In addition, the same nerves are tested with the MBB as are treated with the neurotomy. The use of a confirmatory block has been strongly suggested due to the high rate of false positives with single blocks (range of 25% to 40%) but this does not appear to be cost effective or to prevent the incidence of false positive response to the neurotomy procedure itself. (Cohen, 2007) (Bogduk, 2000) (Cohen2, 2007) (Mancchukonda, 2007) (Dreyfuss, 2000) (Manchikanti2, 2003) (Datta, 2009)

Etiology of false positive blocks: Placebo response (18-32%), use of sedation, liberal use of local anesthetic, and spread of injectate to other pain generators. The concomitant use of sedative during the block can also interfere with an accurate diagnosis. (Cohen, 2007)

MBB procedure: The technique for medial branch blocks in the lumbar region requires a block of 2 medial branch nerves (MBN). The recommendation is the following: (1) L1-L2 (T12 and L1 MBN); (2) L2-L3 (L1 and L2 MBN); (3) L3-L4 (L2 and L3 MBN); (4) L4-L5 (L3 and L4 MBN); (5) L5-S1: the L4 and L5 MBN are blocked, and it is recommended that S1 nerve be blocked at the superior articular process. Blocking two joints such as L3-4 and L4-5 will require blocks of three nerves (L2, L3 and L4). Blocking L4-5 and L5-S1 will require blocks of L3, L4, L5 with the option of blocking S1. (Clemans, 2005) The volume of injectate for diagnostic medial branch blocks must be kept to a minimum (a trace amount of contrast with no more than 0.5 cc of injectate), as increased volume may anesthetize other potential areas of pain generation and confound the ability of the block to accurately diagnose facet pathology. Specifically, the concern is that the lateral and intermediate branches will be blocked; nerves that innervate the paraspinal muscles and fascia, ligaments, sacroiliac joints and skin. (Cohen, 2007) Intraarticular blocks also have limitations due to the fact that they can be technically challenging, and if the joint capsule ruptures, injectate may diffuse to the epidural space, intervertebral foramen, ligamentum flavum and paraspinal musculature. (Cohen, 2007) (Washington, 2005) (Manchikanti , 2003) (Dreyfuss, 2003) (BlueCross BlueShield, 2004) (Pneumaticos, 2006) (Boswell, 2007)

(Boswell2, 2007) A recent meta-analysis concluded that there is insufficient evidence to evaluate validity or utility of diagnostic selective nerve root block, intra-articular facet joint block, medial branch block, or sacroiliac joint block as diagnostic procedures for low back pain with or without radiculopathy. (Chou2, 2009) This study suggests that proceeding to radiofrequency denervation without a diagnostic block is the most cost-effective treatment paradigm, but does not result in the best pain outcomes. (Cohen, 2010) *See also Facet joint pain, signs & symptoms; Facet joint radiofrequency neurotomy; Facet joint medial branch blocks (therapeutic injections); & Facet joint intra-articular injections (therapeutic blocks). Also see Neck Chapter and Pain Chapter.*

Criteria for the use of diagnostic blocks for facet "mediated" pain:
Clinical presentation should be consistent with *facet joint pain, signs & symptoms*.

1. One set of diagnostic medial branch blocks is required with a response of ≥ 70%. The pain response should last at least 2 hours for Lidocaine.
2. Limited to patients with low-back pain that is non-radicular and at no more than two levels bilaterally.
3. There is documentation of failure of conservative treatment (including home exercise, PT and NSAIDs) prior to the procedure for at least 4-6 weeks.
4. No more than 2 facet joint levels are injected in one session (see above for medial branch block levels).
5. Recommended volume of no more than 0.5 cc of injectate is given to each joint.
6. No pain medication from home should be taken for at least 4 hours prior to the diagnostic block and for 4 to 6 hours afterward.
7. Opioids should not be given as a "sedative" during the procedure.
8. The use of IV sedation (including other agents such as midazolam) may be grounds to negate the results of a diagnostic block, and should only be given in cases of extreme anxiety.
9. The patient should document pain relief with an instrument such as a VAS scale, emphasizing the importance of recording the maximum pain relief and maximum duration of pain. The patient should also keep medication use and activity logs to support subjective reports of better pain control.
10. Diagnostic facet blocks should not be performed in patients in whom a surgical procedure is anticipated. (Resnick, 2005)
11. Diagnostic facet blocks should not be performed in patients who have had a previous fusion procedure at the planned injection level. [Exclusion Criteria that would require UR physician review: Previous fusion at the targeted level. (Franklin, 2008)]

Claimant called Dr. Bto testify in support of his contention that the IRO physician reviewer erred in upholding Carrier's denial of the facet injection at L5-S1. Dr. B testified that the first URA doctor had erred in assuming that he had requested facet injections at two levels because the L5-S1 interdiscal space constitutes a single level of the spine. He also testified that spinal surgery is not anticipated for Claimant's compensable injury despite the earlier requests for surgery. Those prior requests for surgery had been denied as not reasonably necessary health care and were no longer pending. Dr. B testified that at the time he requested preauthorization for the facet injections, there was no surgery pending nor would spinal surgery be consistent with the ODG recommendations. Dr. B testified that Claimant meets the criteria in the ODG for diagnostic facet injections because the tenderness at L5-S1 observed during clinical examination is consistent with facet mediated pain, Claimant no longer has radicular complaints; Claimant has undergone more than six weeks of conservative care including the use of prescription medications and physical therapy without success, and the requested injection would take place at a single level.

In determining the weight to be given to expert testimony, a trier of fact must first determine if the expert is qualified to offer it. The trier of fact must then determine whether the opinion is relevant to the issues at bar and whether it is based upon a solid foundation. An expert's bald assurance of validity is not enough. *See* Black vs. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999); E.I. Du Pont De Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). Evidence is considered in terms of general acceptance of the theory and technique by the relevant scientific community; the expert's qualifications; the existence of literature supporting or rejecting the theory; the technique's potential rate of error; the availability of other experts to test and evaluate the technique; and 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). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. Black v. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999).

Dr. B is a board-certified orthopedic surgeon. His recommendation is based on the medical records, his physical examination of the Claimant, his training and expertise, and the criteria set out in the ODG for diagnostic facet injections. Dr. B noted that Claimant is not scheduled for any surgery nor is there any surgery proposed. At this time, surgery is not anticipated and the prior recommendations for spinal fusion, especially when there is no evidence that Claimant suffers from spinal instability, is not a material factor in determining whether the proposed diagnostic facet injections are reasonably necessary. After considering the evidence presented, the hearing officer finds that the preponderance of the evidence-based medical evidence is contrary to the IRO recommendation that the diagnostic facet injection at L5-S1 is not reasonably required health care for the compensable injury of (Date of Injury). The request for preauthorization of the facet injection is consistent with the recommendations of the ODG and is

reasonably required health care for the compensable injury. The IRO decision in this matter is overturned.

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), Employer.

   C. On (Date of Injury), Employer provided workers' compensation insurance with Liberty Insurance Corporation, Carrier.

   D. Claimant sustained a compensable injury on (Date of Injury).

   E. Claimant's doctor, KB, MD, requested preauthorization for facet injections at L5 and S1.

   F. The request for preauthorization was denied by Carrier.

   G. Carrier's denial of preauthorization for the requested facet injections was appealed to an independent review organization.

   H. The Texas Department of Insurance appointed P-IRO Inc. as the independent review organization in this matter.

   I. The independent review organization upheld Carrier's denial of the requested facet injections.

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. Dr. B testified that Claimant has facet mediated pain and meets the criteria set forth in the ODG for the use of diagnostic blocks for facet mediated pain.

4. The preponderance of the evidence-based medical evidence is consistent with Dr. B's determination that Claimant meets the criteria for diagnostic facet injections in the ODG.

5. The proposed left L5-left S1 facet injection is reasonably required medical treatment 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 IRO that the left L5-left S1 facet injection is not reasonably required health care for the compensable injury of (Date of Injury).

DECISION

Claimant is entitled to the left L5-left S1 facet injection for the compensable injury of (Date of Injury).

ORDER

Carrier is 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 INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CORPORATION SERVICE CO.
211 EAST 7TH STREET, STE. 620
AUSTIN, TX 78701-3218

Signed this 22nd day of March, 2013.

KENNETH A. HUCHTON
Hearing Officer