

MEDICAL CONTESTED CASE HEARING NO. 13092

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 May 9, 2013 to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the IRO that the claimant is not entitled to Inpatient surgery with 2-3 day LOS/360 degree fusion at L4-S1 with left laminectomy for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner KBJ did not appear.

Claimant appeared and was assisted by SC, ombudsman.

Respondent/Carrier appeared and was represented by GS, attorney.

BACKGROUND INFORMATION

Claimant severely injured his low back on (Date of Injury) when he jumped from the platform of a drilling rig, landing 14 feet below on hard ground. Conservative treatment, including physical therapy and epidural steroid injections, failed to relieve his radiating low back pain. He was referred to Dr. KJ, who on November 11, 2011 recommended an L4-S1 anterior posterior fusion with a left laminectomy and facetectomy. On September 25, 2012 Claimant had a psychiatric evaluation that reflected that he had moderate anxiety and severe depression, but the evaluator cleared Claimant for surgery.

An October 10, 2012 preauthorization reviewer non-certified the request for the fusion because Claimant's diagnostic tests revealed no spinal instability or spondylolisthesis. He was however cleared for decompressive lumbar surgery. Upon reconsideration, another reviewer also non-certified the surgery as proposed because there was no evidence of significant impingement or spinal instability. Dr. J then appealed the preauthorization denials to an Independent Review Organization (IRO). In a Notice of Independent Review Decision dated November 21, 2012, the IRO reviewer upheld the previous denials. The reviewing doctor stated that multiple diagnostic tests failed to show any evidence of spinal instability; that Claimant had high levels of pain at all three levels and had no clear control test; and that although cleared for surgery he had high levels of depression, which would make him a poor surgical candidate. The IRO opinion stated that the

proposed surgery did not meet evidence-based guidelines and was not medically necessary treatment for Claimant's injury.

Claimant contends that the IRO decision did not meet the Official Disability Guidelines (ODG) and that the requesting surgeon states that if Claimant only receives a lumbar decompression that he will still ultimately need a fusion.

Carrier's position is that not only did the IRO decision meet the ODG guidelines as certified in the decision, that it is Claimant's burden to prove by evidence-based medicine that the IRO decision was contrary to the preponderance of the evidence, and that Claimant was unable to provide the required evidence. The carrier noted that for a fusion, the ODG requires objective documentation of spinal instability and that the diagnostic tests show no instability.

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. 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."

In reference to a spinal fusion, the Official Disability Guidelines provide:

Not recommended for patients who have less than six months of failed recommended conservative care unless there is objectively demonstrated severe structural instability and/or acute or progressive neurologic dysfunction, but recommended as an option for spinal fracture, dislocation, spondylolisthesis or frank neurogenic compromise, subject to the selection criteria outlined in the section below entitled, "Patient Selection Criteria for Lumbar Spinal Fusion," after 6 months of conservative care.

Presurgical biopsychosocial variables predict patient outcomes from lumbar fusion, which may help improve patient selection. Workers' compensation status, smoking, depression, and litigation were the most consistent presurgical predictors of poorer patient outcomes. Other predictors of poor results were number of prior low back operations, low household income, and older age.

Patient Selection Criteria for Lumbar Spinal Fusion:

For chronic low back problems, fusion should not be considered within the first 6 months of symptoms, except for fracture, dislocation or progressive neurologic loss. Indications for spinal fusion may include:

- (1) Neural Arch Defect - Spondylolytic spondylolisthesis, congenital neural arch hypoplasia
- (2) Segmental Instability (objectively demonstrable) - Excessive motion, as in degenerative spondylolisthesis, surgically induced segmental instability and mechanical intervertebral collapse of the motion segment and advanced degenerative changes after surgical discectomy, with relative angular motion greater than 20 degrees. (Andersson, 2000) (Luers, 2007)]
- (3) Primary Mechanical Back Pain (i.e., pain aggravated by physical activity)/Functional Spinal Unit Failure/Instability, including one or two level segmental failure with progressive degenerative changes, loss of height, disc loading capability. In cases of workers' compensation, patient outcomes related to fusion may have other confounding variables that may affect overall success of the procedure, which should be considered. There is a lack of support for fusion for mechanical low back pain for subjects with failure to participate effectively in active rehab pre-op, total disability over 6 months, active psych diagnosis, and narcotic dependence. Spinal instability criteria includes lumbar inter-segmental movement of more than 4.5 mm. (Andersson, 2000)

- (4) Revision Surgery for failed previous operation(s) if significant functional gains are anticipated. Revision surgery for purposes of pain relief must be approached with extreme caution due to the less than 50% success rate reported in medical literature.
- (5) Infection, Tumor, or Deformity of the lumbosacral spine that cause intractable pain, neurological deficit and/or functional disability.
- (6) After failure of two discectomies on the same disc, fusion may be an option at the time of the third discectomy, which should also meet the ODG criteria.

(See *ODG Indications for Surgery -- Discectomy.*)

Pre-Operative Surgical Indications Recommended: Pre-operative clinical surgical indications for spinal fusion should include all of the following:

- (1) All pain generators are identified and treated; &
- (2) All physical medicine and manual therapy interventions are completed; &
- (3) X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or discography (see discography criteria) & MRI demonstrating disc pathology correlated with symptoms and exam findings; &
- (4) Spine pathology limited to two levels; &
- (5) Psychosocial screen with confounding issues addressed.
- (6) For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing.

(Colorado, 2001) (BlueCross BlueShield, 2002)

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

The IRO decision determined that the proposed fusion did not meet the ODG Guidelines for several reasons, but most importantly because Claimant had no objectively documented spinal instability. Claimant's evidence did not contradict the lack of demonstrated instability. Claimant also did not meet his burden of overcoming the IRO decision by a preponderance of the evidence-based medicine. The preponderance of the evidence-based medical evidence is not contrary to the decision of the IRO that Claimant is not entitled to inpatient surgery with 2-3 day LOS/360 degree fusion at L4-S1 with left laminectomy for the (Date of Injury) compensable 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), Employer.
 - C. On (Date of Injury), Employer provided workers' compensation coverage with Insurance Company of the State of Pennsylvania.
 - D. On (Date of Injury), Claimant sustained a compensable injury.
2. Carrier delivered to Claimant and Provider 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 IRO decision determined that the objective diagnostic tests did not demonstrate lumbar spine instability as required by the ODG for a lumbar spine fusion.
4. Inpatient surgery with 2-3 day LOS/360 degree fusion at L4-S1 with left laminectomy 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 inpatient surgery with 2-3 day LOS/360 degree fusion at L4-S1 with left laminectomy is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to inpatient surgery with 2-3 day LOS/360 degree fusion at L4-S1 with left laminectomy 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 in accordance with §408.021.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

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

Signed this 20th day of May, 2013.

David Wagner
Hearing Officer