

MEDICAL CONTESTED CASE HEARING NO. 13095

**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 contested case hearing was held on May 1, 2013 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the IRO that the Claimant is entitled to a 360° spinal fusion surgery at the L5-S1 level for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

Claimant appeared and was represented by RB, attorney.

Carrier appeared and was represented by GT, attorney.

**EVIDENCE PRESENTED**

The following witnesses testified:

For Claimant: Claimant

For Carrier: None

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits HO-1 through HO-7

Claimant's Exhibits C-1 through C-26

Carrier's Exhibits CR-A through CR-KK

**BACKGROUND INFORMATION**

The Medical Contested Case Hearing was held in conjunction with a Benefit Contested Case Hearing that dealt with eight separate issues including whether or not the compensable injury extends to the lumbar disc lesion that is the subject of this medical necessity hearing. As a result, the parties understand that the final determination concerning spinal surgery will depend on a

determination that the compensable injury extends to the lumbar lesion and a favorable ruling in the medical necessity hearing. The record closed on May 15, 2013.

Claimant worked as a driver for the Employer. He had two separate vehicle accidents that are the subject of this hearing.

On (Date of Injury), Claimant was driving a truck pulling a trailer. As he slowed to make a right turn, he was hit from behind. Following accident, Claimant sought medical treatment at a local hospital with a complaint of neck pain and right arm numbness. He was diagnosed with a cervical sprain, provided medication and released.

On June 9, 2011, Claimant sought chiropractic care and was diagnosed with fourteen separate conditions. Claimant was referred to Dr. Small for pain management. He diagnosed Claimant with a whiplash condition, but recorded no complaints of lumbar problems.

In July of 2011, Claimant became dizzy while walking and briefly passed out. Claimant was referred to Dr. K for a neurologic evaluation and work up on August 2, 2011. Dr. K documented that Claimant's straight leg raising test was negative but the back exam was significant for mild spasms seen in the lumbar paraspinal muscles. EMG testing for lumbar radiculopathy was negative.

Claimant was evaluated by Dr. B, the designated doctor, to determine maximum medical improvement (MMI) and the impairment rating. Dr. B found Claimant to have reached MMI on September 9, 2011 for a sprain/strain injury to the cervical, thoracic and lumbar spine. He determined that the sprain/strain injuries had resolved and that Claimant had a zero percent impairment rating.

Claimant was evaluated by Dr. J on February 6, 2012 for a second opinion. Claimant presented with his chief complaint of low back pain with constant aching and throbbing pain down each leg. Dr. J provided a diagnosis of lumbar back pain with right S1 radiculopathy. The report provided a history of lumbar pain with radicular symptoms following the vehicle accident on (Date of Injury). The medical records do not support this allegation. Dr. J recommended a lumbar MRI.

The MRI dated March 1, 2012 was read to show disc desiccation at L5-S1 and a disc bulge with focal disc protrusion on the right side with impingement on the thecal sac and right S1 nerve root.

On May 7, 2012, Claimant was involved in a second vehicle accident. Again, he was driving a truck pulling a trailer and the trailer was hit from behind by a third vehicle. Claimant sought medical treatment at the emergency room of a local hospital with complaints of back and neck

pain. Claimant was diagnosed with low back strain and neck strain. He was given pain medication and released.

On May 9, 2012, Claimant returned for chiropractic treatment and was diagnosed with fifteen separate conditions resulting from the May 7, 2012 vehicle accident.

Claimant returned to Dr. J in August 2012. Following further testing, he diagnosed Claimant with a herniated disc at L5-S1 and recommended surgery.

The Carrier initially denied the requested surgery, but on reconsideration approved a bilateral laminectomy only. Dr. J had requested a 360° spinal fusion surgery. Claimant appealed the Carrier denial to an Independent Review Organization (IRO). The IRO agreed with Dr. J and overturned the Carrier's denial. The Carrier has appealed the IRO decision and has the burden to present sufficient evidence to overturn the IRO decision.

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 Official Disability Guidelines (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 Official Disability Guidelines (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 Official Disability Guidelines (ODG) provides the following criteria for spinal fusion surgery:

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.)

Carrier relies on the utilization review doctor who concluded that Claimant does not meet the instability requirement to warrant the performance of the fusion procedure.

The Claimant contends that fusion surgery is appropriate because after the laminectomy is completed Claimant will have surgically induced instability that then will require fusion surgery. Although, Claimant does not now have sufficient loss of segment integrity to justify a fusion surgery, he will necessarily have instability when the first part of the surgery is completed, the laminectomy. The IRO doctor agreed with Dr. J's explanation as to the need for fusion surgery and overturned the Carrier's denial of the fusion surgery.

The Carrier now argues that Dr. J's opinion and the IRO decision are not based on evidence based medicine and the preponderance of the evidence based medicine supports the Carrier's utilization review doctor's opinion. I disagree. The selection criteria set out in the ODG for lumbar spinal fusion specifically lists surgically induced segmental instability as pointed out by Dr. J. The preponderance of the evidence is not contrary to the IRO decision.

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. At all times pertinent to this case, Claimant was the employee of (Employer), Employer.
  - C. At all times pertinent to this case, Employer provided workers' compensation insurance with The Travelers Indemnity Company, Carrier.
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. J has recommended a 360° spinal fusion surgery at the L5-S1 level for Claimant's lumbar condition.
4. The IRO Decision overturned the Carrier's denial of Claimant's request for spinal surgery by Dr. J.
5. The preponderance of the evidence is not contrary to the IRO Decision that a 360° spinal fusion surgery at L5-S1 level is health care reasonably required for Claimant's lumbar condition.

## 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 the Claimant is entitled to a 360° spinal fusion surgery at the L5-S1 level pending final resolution of the extent of the compensable injury of (Date of Injury).

## DECISION

The preponderance of the evidence is not contrary to the decision of the IRO that the Claimant is entitled to a 360° spinal fusion surgery at the L5-S1 level pending final resolution of the extent of the compensable injury of (Date of Injury).

## ORDER

Carrier is not liable for the benefits at issue in this hearing pending final resolution of the extent of the compensable injury of (Date of Injury). 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 TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is:

**CORPORATION SERVICE CO. D/B/A CSC-LAWYERS INCORPORATING SERVICE CO.  
211 EAST 7TH STREET STE. 620  
AUSTIN, TX 78701**

Signed this 23<sup>rd</sup> day of May, 2013.

Donald E. Woods  
Hearing Officer