

MEDICAL CONTESTED CASE HEARING NO. 13122

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 August 20, 2013, to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the IRO that Claimant is not entitled to Inpatient Lumbar Fusion at L1-L2 for 3 days length of stay (LOS) and purchase of Lumbar Brace for the compensable injury of (Date of Injury)?

At the request of the Carrier and upon a finding of good cause by the hearing officer, the following issue was added:

Did Claimant timely appeal the IRO decision?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by ombudsman CR. Respondent/Carrier appeared and was represented by attorney EC.

OFFICIAL NOTICE

Official notice was taken that:

- A. April 22, 2013, was a Monday.
- B. April 19, 2013, was a Friday.
- C. April 2, 2013, was a Tuesday.

EVIDENCE PRESENTED

The following witnesses testified:

For Claimant: Claimant.

For Carrier: WN, M.D.

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits: HO-1 and HO-2.

Claimant's Exhibits: C-1 through C-8.

Carrier's Exhibits: CR-A through CR-Z.

BACKGROUND INFORMATION

Claimant is a 73-year-old man who injured his back while lifting 100-pound bags of sand while at work on (Date of Injury). He is status post L2-L5 fusion in the past. He had instrumentation removed in 2009. His last fusion was at L3 performed in 2004. His surgeon, JR, M.D., has recommended spinal surgery at the L1-L2 level for 3 days length of stay (LOS) and purchase of Lumbar Brace. Carrier's pre-authorization doctors denied the request. An IRO was requested and he agreed with the denial. Claimant contends he is entitled to the surgery and Carrier agrees with the IRO doctor.

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 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 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."

On the date of this medical contested case hearing, the Official Disability Guidelines provided the following with regard to a lumbar fusion at L1-L2:

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)).

On the date of this medical contested case hearing, the Official Disability Guidelines provided the following with regard to Back Brace, post operative (fusion):

Under study, but given the lack of evidence supporting the use of these devices, a standard brace would be preferred over a custom post-op brace, if any, depending on the experience and expertise of the treating physician. There is conflicting evidence, so case by case recommendations are necessary (few studies though lack of harm and standard of care). There is no scientific information on the benefit of bracing for improving fusion rates or clinical outcomes following instrumented lumbar fusion for degenerative disease. Although there is a lack of data on outcomes, there may be a tradition in spine surgery of using a brace post-fusion, but this tradition may be based on logic that antedated internal fixation, which now makes the use of a brace questionable. For long bone fractures prolonged immobilization may result in debilitation and stiffness; if the same principles apply to uncomplicated spinal fusion with instrumentation, it may be that the immobilization is actually harmful. Mobilization after instrumented fusion is logically better for health of adjacent segments, and routine use of back braces is harmful to this principle. There may be special circumstances (multilevel cervical fusion, thoracolumbar unstable fusion, non-instrumented fusion, mid-lumbar fractures, etc.) in which some external immobilization might be desirable. (Resnick, 2005).

Dr. WN, a board-certified orthopedic surgeon, testified at the August 20, 2013, CCH. Dr. N stated that he had reviewed extensive medical records with regard to this claim. Dr. N opined that he had reviewed the utilization review reports and the IRO and agreed with the denial of the requested spinal surgery. Dr. N testified that there were two main reasons why the proposed spinal surgery was not medically necessary and they were:

1. There was inadequate documentation that the proposed level of surgery is the level of pathology that is causing the pain based upon inadequate physical examination findings and;
2. The proposed surgery does not meet the ODG indicators for the procedure.

Dr. N explained that Claimant has severe spine disease and already has a fusion between L2 and S1 and that a fusion should only be considered when one or two levels of the spine are involved with pathology and in this particular case there are already 5 levels of the spine involved. Dr. N also opined that there was not a full and thorough physical examination performed in terms of documenting that the pain is coming from the L1 and L2 levels. He further opined that the documentation he reviewed indicated that the pain is actually at a lower level. Dr. N based his medical opinion upon reasonable medical probability based upon evidence based medicine and the ODG. Claimant has not been able to meet his burden of proof with regard to the requested spinal surgery.

With regard to the second issue, Rule 133.308(t)(1)(B)(i) states that the written appeal must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party and must be filed in compliance with Division rules. The IRO decision certified that it was sent to all parties via U.S. Postal Service on April 2, 2013. Rule 102.4(h) states that, unless the great weight of the evidence indicates otherwise, written communications shall be deemed to have been sent on the date received, if sent by fax, personal delivery or electronic transmission, or the date postmarked, if sent by mail via United States Postal Service regular mail. If the postmark date is unavailable, the later of the signature date on the written communication or the date it was received minus five days is the date it is deemed to have been sent. The IRO decision was sent to Claimant by mail. The Claimant offered no evidence of the postmark date on the IRO decision and it is deemed to have been sent on April 2, 2013. Rule 133.308(t)(1)(B)(i) states that the request for hearing must be filed within 20 days from the date the decision is sent by the IRO. In accordance with Rule 102.3(a)(1), Claimant's appeal of the IRO decision was due on April 22, 2013. The appeal, filed with the Division on April 25, 2013, was not timely.

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 through Carrier TPCIGA for Reliance National Indemnity, an Impaired Carrier.
 - D. Claimant sustained a compensable spinal injury on (Date of Injury).
 - E. The Independent Review Organization determined that Claimant should not have an Inpatient Lumbar Fusion at L1-L2 for 3 days length of stay (LOS) and purchase of Lumbar Brace 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. An Inpatient Lumbar Fusion at L1-L2 for 3 days length of stay (LOS) and purchase of Lumbar Brace is not health care reasonably required for the compensable injury of (Date of Injury).
 4. Claimant filed a written request for appeal of the IRO decision with the Division on April 25, 2013, a period of more than 20 days after the decision had been sent to the Claimant on April 2, 2013.

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 an Inpatient Lumbar Fusion at L1-L2 for 3 days length of stay (LOS) and purchase of Lumbar Brace is not health care reasonably required for the compensable injury of (Date of Injury).
4. The IRO decision was not timely filed and the Claimant's appeal is hereby dismissed.

DECISION

Claimant is not entitled to an Inpatient Lumbar Fusion at L1-L2 for 3 days length of stay (LOS) and purchase of Lumbar Brace for the compensable injury of (Date of Injury). The IRO decision was not timely filed and the Claimant's appeal is hereby dismissed.

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 **TPCIGA FOR RELIANCE NATIONAL INDEMNITY, AN IMPAIRED CARRIER**, and the name and address of its registered agent for service of process is

**MARVIN KELLEY, EXECUTIVE DIRECTOR
TPCIGA
9120 BURNET ROAD
AUSTIN, TEXAS 78758**

Signed this 26th day of August, 2013

Cheryl Dean
Hearing Officer