

MEDICAL CONTESTED CASE HEARING NO. 14028

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 benefit contested case hearing was held on October 30, 2013 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the IRO that the Claimant is not entitled to an extreme lumbar interbody fusion w/ORIF 4 day inpatient stay for the compensable injury of (Date of Injury)?

At the Carrier's request, and upon a finding of good cause, the following issue was added:

Did the Claimant timely file his appeal of the IRO's determination that Claimant is not entitled to an extreme lumbar interbody fusion w/ORIF 4 day inpatient stay for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Claimant appeared and was assisted by AC, ombudsman.
Carrier appeared and was represented by DS, attorney.

EVIDENCE PRESENTED

The following witnesses testified:

For Claimant: Claimant.

For Carrier: Dr. W.

The following exhibits were admitted into evidence:

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

Claimant's Exhibits: C-1 through C-6.

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

BACKGROUND INFORMATION

It is undisputed that the Claimant sustained an injury to his lumbar spine as a result of a compensable injury sustained on (Date of Injury). As a result of the compensable injury, Claimant had surgery to his lumbar spine in 2010. The IRO reviewer, an Orthopedic Surgeon, reviewed various office notes and diagnostic studies. The IRO physician opined that the Official Disability Guidelines (ODG) “do not support a lumbar fusion without evidence of a significant neural arch defect or segmental instability that is greater than 4.5 mm.” He further noted that the “patient’s prior CT scan does not report instability...The proposed fusion at L4-5 will transfer stress to adjacent disc levels that are abnormal. Please recall that after the multi-level laminectomy in 2010, the patient did not report improvement.”

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 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."

With regard to the procedure at issue, the ODG provides as follows:

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.)

Claimant relied on the medical reports and argued that the medical reports support the *ODG's* recommendations. However, the Claimant failed to submit other evidence-based medicine in support of the necessity of the procedure and rebut the IRO reviewer's opinion. Based on the evidence presented, the Claimant does not meet the criteria for the extreme lumbar interbody fusion with ORIF. The preponderance of the evidence is not contrary to the decision of the IRO.

The evidence also established that on June 26, 2013, the IRO decision was mailed to the Claimant's residence. The evidence established that Claimant had moved and the IRO decision was resent to his new address on July 19, 2013. Claimant appealed the IRO decision on August 14, 2013. The evidence established that Claimant filed his appeal more than 20 days after it was re-mailed to him on July 19, 2013. Therefore, Claimant's appeal was untimely.

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 Mid-Century Insurance Company, Carrier.
 - D. On (Date of Injury), Claimant sustained a compensable 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. The Independent Review Organization determined that Claimant should not have the proposed treatment.
4. The Claimant does not meet the ODG criteria as a candidate for an extreme interbody lumbar fusion with ORIF as recommended by the Claimant's treating surgeon.
5. The preponderance of the evidence based medical evidence is not contrary to the determination of the IRO.
6. The extreme interbody lumbar fusion with ORIF is not health care reasonably required for the compensable injury of (Date of Injury).
7. The IRO decision was re-mailed to the Claimant's correct address on July 19, 2013 and Claimant did not request an appeal of the IRO's determination until August 14, 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 IRO's decision that the Claimant is not entitled to an extreme lumbar interbody fusion w/ORIF 4 day inpatient stay for the compensable injury of (Date of Injury).
4. Claimant did not timely file his appeal of the IRO's determination that Claimant is not entitled to an extreme lumbar interbody fusion w/ORIF 4 day inpatient stay for the compensable injury of (Date of Injury).

DECISION

The preponderance of the evidence is not contrary to the IRO's decision that the Claimant is not entitled to an extreme lumbar interbody fusion w/ORIF 4 day inpatient stay for the compensable injury of (Date of Injury). Claimant did not timely file his appeal of the IRO's determination that Claimant is not entitled to an extreme lumbar interbody fusion w/ORIF 4 day inpatient stay 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 **MID-CENTURY INSURANCE COMPANY**, and the name and address of its registered agent for service of process is

**CHRIS GRANGER
15700 LONG VISTA DRIVE
AUSTIN, TEXAS 78728-3822**

Signed this 7th day of November, 2013.

Teresa G. Hartley
Hearing Officer