

MEDICAL CONTESTED CASE HEARING NO. 14047

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 February 20, 2014 to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization that Claimant is not entitled to outpatient surgery for rotator cuff repair, distal clavicle resection, and subacromial decompression for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by DB, ombudsman.
Respondent/Carrier appeared and was represented by JF, attorney.

BACKGROUND INFORMATION

Claimant, Employer's band director, was injured on (Date of Injury) when he injured his shoulder as he prevented a 300-400 pound music stand from falling. He testified that he felt immediate pain and a pull/tear when he grabbed the stand. He sought medical treatment from Dr. JM on November 12, 2012. The doctor prescribed an immobilizer after viewing an x-ray that did not show a fracture. By November 19, 2012, the doctor prescribed physical therapy. Documentary evidence shows that Claimant attended physical therapy on 15 different dates between November 27, 2012 and March 12, 2013. Documentary evidence confirms Claimant's testimony that Carrier denied the doctor's request for further therapy.

By April 24, 2013, Dr. M noted that Claimant, who had been pain free for 3 months, was experiencing pain again at 30% of the original pain level. The doctor ordered a magnetic resonance imaging and wrote that the imaging, done in May, showed a partial tear. He referred Claimant to JR, M.D.

Dr. R examined Claimant on September 23, 2013. He recommended that Claimant have surgery, described as rotator cuff repair, distal clavicle resection, and subacromial decompression on the right shoulder. Two utilization reviewers and a reviewer for an independent review organization denied the request for surgery. The reviewer for the independent review organization relied on the Official Disability Guidelines (ODG) and pointed out that the reviewer could not find documentation of completion of a 3 month course of conservative treatment, clinical findings of

pain with active arc of motion, and pain at night. The reviewer did not point out any other deficiencies.

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."

The ODG provides the following indications for rotator cuff repair surgery:

Criteria for rotator cuff repair OR anterior acromioplasty with diagnosis of partial thickness rotator cuff repair OR acromial impingement syndrome (80% of these patients will get better without surgery)

- (1) Conservative Care: Recommend 3 to 6 months: Three months is adequate if treatment has been continuous, six months if treatment has been intermittent. Treatment must be directed toward gaining full ROM, which

requires both stretching and strengthening to balance the musculature.
PLUS

- (2) Subjective Clinical Findings: Pain with active arc motion 90 to 130 degrees. AND Pain at night (Tenderness over the greater tuberosity is common in acute cases.) PLUS
- (3) Objective Clinical Findings: Weak or absent abduction; may also demonstrate atrophy. AND Tenderness over rotator cuff or anterior acromial area. AND Positive impingement sign and temporary relief of pain with anesthetic injection (diagnostic injection test). PLUS
- (4) Imaging Clinical Findings: Conventional x-rays, AP, and true lateral or auxiliary view. AND Gadolinium MRI, ultrasound, or arthrogram shows positive evidence of deficit in rotator cuff. (Washington, 2002)

Claimant tendered into evidence a letter written by Dr. R on January 31, 2014. The doctor, who was responding to the IRO's decision, admitted that he had not documented night pain, commenting that the pain was there but he had just failed to document it when he saw Claimant on September 23, 2013. He said that his notes of September 23, 2013 confirmed that Claimant had completed a course of physical therapy, had received a steroid injection, and had taken nonsteroidal anti-inflammatory drugs and oral anti-inflammatories. The doctor pointed out that additional physical therapy had been denied by Carrier. In addition, the doctor noted that he had documented pain with Claimant's ability in overhead activities. He wrote that his original note of September 23, 2013 showed subjective clinical findings of pain with active arc of motion, explaining that one cannot successfully get an arm overhead without completing that arc. The doctor's writing of January 31, 2014 was not persuasive.

A fair reading of the evidence submitted by Claimant shows the IRO reviewer was correct in writing there was not documentation concerning Claimant's pain with active arc of motion 90 to 130 degrees or pain at night. The reviewer was incorrect in writing that Claimant had not completed conservative care.

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, who was the employee of (Employer), sustained a compensable injury.
 - C. On (Date of Injury), Employer provided workers' compensation insurance with East Texas Educational Insurance Association.
 - D. The Independent Review Organization determined that the requested services were not reasonable and necessary health care services 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. Outpatient surgery for rotator cuff repair, distal clavicle resection, and subacromial decompression 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 Independent Review Organization that outpatient surgery for rotator cuff repair, distal clavicle resection, and subacromial decompression is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to outpatient surgery for rotator cuff repair, distal clavicle resection, and subacromial decompression 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 **EAST TEXAS EDUCATIONAL INSURANCE ASSOCIATION** and the name and address of its registered agent for service of process is

**SUPERINTENDENT
(EMPLOYER)
(STREET)
(CITY), (STATE) (ZIPCODE)**

Signed this 24th day of February, 2014.

CAROLYN F. MOORE
Hearing Officer