

MEDICAL CONTESTED CASE HEARING NO. 15018

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and the Rules of the Texas Department of Insurance, Division of Workers' Compensation. For the reasons discussed herein, the Hearing Officer determines that Claimant is entitled to an outpatient left-sided L4-5 minimally invasive lumbar decompression for the compensable injury of (Date of Injury).

STATEMENT OF THE CASE

On January 8, 2015, Carol A. Fougerat, a Division Hearing Officer, held a contested case hearing to decide the following disputed issue:

Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to an outpatient left-sided L4-5 minimally invasive lumbar decompression for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner/Claimant appeared and was represented by AT, attorney.
Respondent/Carrier appeared and was represented by NM, adjuster.

DISCUSSION

Claimant sustained a compensable injury to his lumbar spine on (Date of Injury). An MRI of the lumbar spine was performed on February 14, 2013, revealing findings of a minimal tear of the annulus fibrosis at L4-5 with no focal disc bulge or disc protrusion. A CT myelogram of the lumbar spine was performed on May 12, 2014, and revealed findings of a rightward protrusion of the L4-5 disc without central canal or neuroforaminal stenosis. Claimant has undergone physical therapy, medication therapy and an L5 selective nerve root block for treatment of his L4-5 disc injury. Claimant testified that he continues to experience low back pain that radiates to his left hip down to his knee. Claimant's treating surgeon, AB, MD has recommended an outpatient left-sided L4-5 minimally invasive lumbar decompression.

Carrier denied this request and Claimant sought review by an IRO. The IRO reviewer, identified as a board certified neurosurgeon, upheld the Carrier's denial. The IRO reviewer referred to the recommendations in the Official Disability Guidelines (ODG), and specifically noted that the ODG require objective evidence of radiculopathy on physical examination and supported by diagnostic imaging. The IRO reviewer noted that there was no information submitted regarding

the patient's strength, sensation or reflex deficits in the lower extremities. The IRO reviewer also noted that there was no information submitted regarding the patient's imaging studies confirming the patient's neurocompressive findings. The IRO reviewer stated that decompression in the lumbar region is indicated for patients who have ongoing symptoms consistent with radiculopathy in the lower extremities following a full course of conservative therapy and imaging studies confirm the patient's significant pathology. Without this information, the requested surgical procedure involving the L4-5 decompression is not recommended as medically necessary.

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."

ODG Recommendations for minimally invasive lumbar decompression:

Not recommended. See Percutaneous discectomy (PCD). Mild® (minimally invasive lumbar decompression), from Vertos Medical, Inc., describes a percutaneous procedure for decompression of the central spinal canal in patients with lumbar spinal stenosis. In contrast to surgical decompression, the mild® procedure is a percutaneous decompressive procedure performed solely under fluoroscopic guidance (e.g., without endoscopic or microscopic visualization of the work area). This procedure is indicated for central stenosis only, without the capability of addressing nerve root compression or disc herniation, should it be required. Due to the unknown impact of these limitations on health outcomes, RCTs in appropriate patients are needed to compare this new procedure with established alternatives. The mild® tool kit initially received 510(k) marketing clearance as the X-Sten MILD Tool Kit (X-Sten Corp.) from the FDA in 2006, with intended use as a set of specialized surgical instruments. (FDA, 2006) While there are no published prospective studies comparing this with established alternatives, it has received coverage in the general press. (NY Times, 2012) According to CMS, percutaneous image guided lumbar decompression (PILD) for lumbar spinal stenosis is not reasonable and necessary. PILD is a posterior decompression of the lumbar spine performed under indirect image guidance without any direct visualization of the surgical area. The procedure is performed under x-ray guidance (e.g., fluoroscopic, CT) with the assistance of contrast media to identify and monitor the compressed area via epidurogram. The procedure that most closely falls under this description is commercially known as the mild® procedure, suggested to offer a minimally invasive alternative to a standard laminotomy-laminectomy. (CMS, 2013)

ODG Indications for Surgery™ -- Discectomy/laminectomy

Required symptoms/findings; imaging studies; & conservative treatments below:

- I. *Symptoms/Findings* which confirm presence of radiculopathy. Objective findings on examination need to be present. Straight leg raising test, crossed straight leg raising and reflex exams should correlate with symptoms and imaging.

Findings require ONE of the following:

- A. L3 nerve root compression, requiring ONE of the following:
 1. Severe unilateral quadriceps weakness/mild atrophy
 2. Mild-to-moderate unilateral quadriceps weakness
 3. Unilateral hip/thigh/knee pain

- B. L4 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral quadriceps/anterior tibialis weakness/mild atrophy
 - 2. Mild-to-moderate unilateral quadriceps/anterior tibialis weakness
 - 3. Unilateral hip/thigh/knee/medial pain
 - C. L5 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral foot/toe/dorsiflexor weakness/mild atrophy
 - 2. Mild-to-moderate foot/toe/dorsiflexor weakness
 - 3. Unilateral hip/lateral thigh/knee pain
 - D. S1 nerve root compression, requiring ONE of the following:
 - 1. Severe unilateral foot/toe/plantar flexor/hamstring weakness/atrophy
 - 2. Moderate unilateral foot/toe/plantar flexor/hamstring weakness
 - 3. Unilateral buttock/posterior thigh/calf pain
- (EMGs are optional to obtain unequivocal evidence of radiculopathy but not necessary if radiculopathy is already clinically obvious.)

- II. *Imaging Studies*, requiring ONE of the following, for concordance between radicular findings on radiologic evaluation and physical exam findings:
 - A. Nerve root compression (L3, L4, L5, or S1)
 - B. Lateral disc rupture
 - C. Lateral recess stenosis

Diagnostic imaging modalities, requiring ONE of the following:

- 1. MR imaging
- 2. CT scanning
- 3. Myelography
- 4. CT myelography & X-Ray

- III. *Conservative Treatments*, requiring ALL of the following:
 - A. Activity modification (not bed rest) after patient education (≥ 2 months)
 - B. Drug therapy, requiring at least ONE of the following:
 - 1. NSAID drug therapy
 - 2. Other analgesic therapy
 - 3. Muscle relaxants
 - 4. Epidural Steroid Injection (ESI)
 - C. Support provider referral, requiring at least ONE of the following (in order of priority):
 - 1. Physical therapy (teach home exercise/stretching)
 - 2. Manual therapy (chiropractor or massage therapist)
 - 3. Psychological screening that could affect surgical outcome
 - 4. Back school

Dr. B testified that the surgery is medical necessary to relieve Claimant's low back and lower extremity symptoms. Dr. B testified that the ODG is a "guideline" and that Claimant meets the "spirit of the ODG" for the recommended surgery. Dr. B agreed that the imaging studies were "not that impressive" regarding the disc pathology at L4-5; however, he testified that the left L5 selective nerve root block (SNRB) that was performed by Dr. B on January 28, 2014 specifically identified Claimant's pain generator. Dr. B explained that the SNRB is a diagnostic technique used to identify the level of the spine causing the symptoms due to the ambiguity in the imaging studies. Dr. B testified that Claimant had clinical signs of radiculopathy, as well as a positive SNRB. Dr. B referred to the ODG criteria regarding the SNRB:

Recommended as indicated below. Diagnostic epidural steroid transformational injections are also referred to as selective nerve root blocks, and they were originally developed as a diagnostic technique to determine the level of radicular pain. In studies evaluating the predictive value of selective nerve root blocks, only 5% of appropriate patients did not receive relief of pain with injections. No more than 2 levels of blocks should be performed on one day. The response to the local anesthetic is considered an important finding in determining nerve root pathology. When used as a diagnostic technique a small volume of local is used (<1.0 ml) as greater volumes of injectate may spread to adjacent levels. When used for diagnostic purposes the following indications have been recommended:

- 1) To determine the level of radicular pain, in cases where diagnostic imaging is ambiguous, including the examples below:
- 2) To help to evaluate a radicular pain generator when physical signs and symptoms differ from that found on imaging studies;
- 3) To help to determine pain generators when there is evidence of multi-level nerve root compression;
- 4) To help to determine pain generators when clinical findings are consistent with radiculopathy (e.g., dermatomal distribution) but imaging studies are inconclusive;
- 5) To help to identify the origin of pain in patients who have had previous spinal surgery.

Dr. B gave a thorough explanation as to how the Claimant met the ODG criteria for the lumbar decompression and why the proposed surgery was medically necessary for Claimant's compensable injury. Based on the evidence presented, the Claimant does meet the criteria set out in the ODG for an outpatient left-sided L4-5 minimally invasive lumbar. The preponderance of the evidence is contrary to the IRO decision that Claimant is not entitled to an outpatient left-sided minimally invasive lumbar decompression for the compensable injury of (Date of Injury).

The Hearing Officer considered all of the evidence admitted. The Findings of Fact and Conclusions of Law are based on an assessment of all of the evidence whether or not the evidence is specifically discussed in this Decision and Order.

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 New Hampshire Insurance Company, Carrier.
 - D. Claimant sustained a compensable injury on (Date of Injury).
 - E. The IRO determined that the proposed outpatient left-sided L4-5 minimally invasive lumbar decompression is not medically necessary 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. Claimant does meet the requirements of the ODG for an outpatient left-sided L4-5 minimally invasive lumbar decompression.
4. An outpatient left-sided L4-5 minimally invasive lumbar decompression is 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 contrary to the decision of the IRO that an outpatient left-sided L4-5 minimally invasive lumbar decompression is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is entitled to an outpatient left-sided L4-5 minimally invasive lumbar decompression for the compensable injury of (Date of Injury).

ORDER

Carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act, and the Commissioner's Rules. Accrued but unpaid income benefits, if any, shall be paid in a lump sum together with interest as provided by law.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE COMPANY**, and the name and address of its registered agent for service of process is:

**CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TX 78701-3232**

Signed this 9th day of January, 2015.

Carol A. Fougerat
Hearing Officer