

**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. For the reasons discussed herein, the Hearing Officer determines that Petitioner / Claimant is not entitled to left ankle hardware removal for the compensable injury of (Date of Injury).

**STATEMENT OF THE CASE**

A medical contested case hearing was held on March 31, 2015, to decide the following disputed issue:

1. Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to left ankle hardware removal for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

Petitioner / Claimant appeared and was assisted by LC, ombudsman. Respondent / Carrier appeared and was represented by SS, attorney.

**EVIDENCE PRESENTED**

The following witnesses testified:

For Petitioner / Claimant: Petitioner / Claimant.

For Carrier / Respondent: None.

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits HO-1 through HO-3.

Petitioner / Claimant's Exhibits C-1 through C-7.

Carrier / Respondent's Exhibits CR-A through CR-D.

**DISCUSSION**

On (Date of Injury), Petitioner / Claimant worked for the employer, (Employer), and sustained an injury to his left ankle. He received medical treatment for his injury and was seen by RSW, M.D., on several occasions, including for surgery that was performed on October 22, 2013. Eventually, a request for left ankle hardware removal was proposed. Such request underwent

utilization review and was denied on November 3, 2014 by KP, D.O., an orthopedic surgeon. Reconsideration was requested and such reconsideration was denied on November 12, 2014 by RU, M.D., another orthopedic surgeon. Petitioner / Claimant then appealed the denials to an IRO and the IRO reviewer, also an orthopedic surgeon, upheld the previous adverse determinations. Consequently, Petitioner / Claimant appealed the IRO decision and this is the reason for the present discussion and decision.

### **Medical Necessity**

An injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. TEX. LAB. CODE ANN. §408.021(a). "Health care reasonably required" is defined 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. TEX. LAB. CODE ANN. §401.011(22a). Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. "Evidence-based medicine" means 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. TEX. LAB. CODE ANN. §401.011(18a). 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. TEX. LAB. CODE ANN. §413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with the Texas Labor Code. TEX. LAB. CODE ANN. §413.017(1).

In accordance with the above statutory guidance, the Division has adopted treatment guidelines by rule. 28 Tex. Admin. Code §137.100 (Division Rule 137.100). This Rule directs health care providers to provide treatment in accordance with the current edition of the *Official Disability Guidelines* (hereinafter "ODG") and that 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.

Some of the pertinent provisions of the ODG applicable to this case are as follows, to wit:

***Hardware implant removal (fracture fixation):***

Not recommended for the routine removal of hardware implanted for fracture fixation, except in the case of broken hardware or persistent pain, after ruling out other causes of pain such as infection and nonunion. Not recommended solely to protect against allergy, carcinogenesis, or metal detection. Although hardware

removal is commonly done, it should not be considered a routine procedure. The decision to remove hardware has significant economic implications, including the costs of the procedure as well as possible work time lost for postoperative recovery, and implant removal may be challenging and lead to complications, such as neurovascular injury, refracture, or recurrence of deformity. Current literature does not support the routine removal of implants to protect against allergy, carcinogenesis, or metal detection. (Busam, 2006). Despite advances in metallurgy, fatigue failure of hardware is common when a fracture fails to heal. Revision procedures can be difficult, usually requiring removal of intact or broken hardware. (Hak, 2008). Following fracture healing, improvement in pain relief and function can be expected after removal of hardware in patients with persistent pain in the region of implanted hardware, after ruling out other causes of pain such as infection and nonunion. (Minkowitz, 2007). The routine removal of orthopaedic fixation devices after fracture healing remains an issue of debate, but implant removal in symptomatic patients is rated to be moderately effective. Many surgeons refuse a routine implant removal policy, and do not believe in clinically significant adverse effects of retained metal implants. Given the frequency of the procedure in orthopaedic departments worldwide, there is an urgent need for a large randomized trial to determine the efficacy and effectiveness of implant removal with regard to patient-centered outcomes. (Hanson, 2008).

In the instant case, the utilization review doctors (i.e., Dr. P and Dr. U) denied the requested treatment and the IRO reviewer upheld the denial of the requested treatment. The IRO reviewer, who is an orthopedic surgeon, reviewed Petitioner / Claimant's records and opined that the proposed treatment was not indicated as medically necessary based on the clinical data provided. Thereafter, the IRO reviewer cited medical judgment, clinical experience and expertise in accordance with accepted medical standards, as well as the ODG, in upholding the denials of the requested treatment.

When weighing expert testimony, the hearing officer must first determine whether the doctor rendering an expert opinion is qualified to offer such. In addition, the hearing officer must determine whether the opinion is relevant to the issues at bar and whether it is based upon a reliable foundation. An expert's bald assurance of validity is not enough. *See Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *E.I. Du Pont De Nemours and Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. *See Black*, 171 F.3d 308. In determining reliability of the evidence, the hearing officer must consider the evidence in terms of (1) general acceptance of the theory and technique by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the theory; (4) the technique's potential rate of error; (5) the availability of other

experts to test and evaluate the technique; (6) the clarity with which the theory or technique can be explained to the trial court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *Kelly v. State*, 792 S.W.2d 579 (Tex. App.-Fort Worth 1990) *aff'd*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Additionally, "[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." *See* Division Rule 133.308 (s). "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." *Id.* Evidence-based medical evidence entails the opinion of a qualified expert that is supported by evidence-based medicine, if evidence-based medicine exists.

Accordingly, Petitioner / Claimant, as the party appealing the IRO decision, had the burden of overcoming the IRO decision by a preponderance of evidence-based medical evidence. Although Petitioner / Claimant presented documentary and testimonial evidence, including his medical records, there was little to no explanation through the use of evidence-based medical evidence as to how Petitioner / Claimant met the requirements of the ODG for the requested treatment. Petitioner / Claimant also did not establish the necessity of the requested treatment at issue through other evidence-based medical evidence outside of the ODG. As such, evidence-based medical evidence explaining that the requested treatment was medically reasonable and necessary was lacking in this case. Therefore, the preponderance of the evidence is not contrary to the decision of the IRO that Petitioner / Claimant is not entitled to left ankle hardware removal 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 an employee of (Employer), the Employer.
  - C. On (Date of Injury), Employer provided workers' compensation insurance with Ace American Insurance Company, the Carrier.
  - D. On (Date of Injury), Claimant sustained a compensable injury.

- E. The IRO determined that Claimant is not entitled to left ankle hardware removal for the compensable injury of (Date of Injury).
2. Respondent / Carrier delivered to Petitioner / Claimant a single document stating the true corporate name of Respondent / Carrier, and the name and street address of Respondent / Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
  3. Left ankle hardware removal 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 IRO that Petitioner / Claimant is not entitled to left ankle hardware removal for the compensable injury of (Date of Injury).

### **DECISION**

Petitioner / Claimant is not entitled to left ankle hardware removal for the compensable injury of (Date of Injury).

### **ORDER**

Respondent / Carrier is not liable for the benefits at issue in this hearing. Petitioner / Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

The true corporate name of the Respondent / insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1999 BRYAN STREET, SUITE 900  
DALLAS, TX 75201-3136**

Signed this 8<sup>th</sup> day of April 2015.

Julio Gomez, Jr.  
Hearing Officer