

MEDICAL CONTESTED CASE HEARING NO. 14016

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 October 09, 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 a posterior lumbar interbody fusion at L3/4 with decompression laminectomy, facetectomy and discectomy with three days inpatient stay for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by CR, ombudsman.
Respondent/Self-Insured appeared and was represented by MM, attorney.

BACKGROUND INFORMATION

On (Date of Injury), Claimant was carrying a table up a flight of stairs when he slipped and fell backwards. He injured his neck and back severely. His injury resulted in two neck surgeries and one back surgery to this point. Claimant's neurosurgeon, JR, M.D., is requesting the lumbar surgery due to Claimant's acquired junctional syndrome – a condition resulting from the forces on the disc located above the L4/5 fusion Claimant underwent on January 15, 2009. Self-Insured's URA doctors denied the request. The IRO doctor agreed with the denial. Claimant is disputing the IRO decision.

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 provides the following with regard to a lumbar 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)

The IRO doctor opines because there is no x-ray showing instability that the requested surgery is not recommended. The IRO doctor is ignoring the rest of the pre-operative surgical indications which is prefaced by an “and/or.” The rest of Recommendation 3 notes “myelogram, CT-myelogram, or discography (see discography criteria) & MRI demonstrating disc pathology correlated with symptoms and exam findings.” Dr. R is basing the need for a fusion on “surgically induced segmental instability” as described by Official Disability Guidelines. He does explain that the MRI showed a junctional syndrome at the L3/4 level above Claimant’s old fusion with severe lumbar stenosis secondary to a diffuse disc protrusion, a right-sided synovial cyst and facet and ligamentous hypertrophy. He described how the MRI findings correlated with symptoms and exam findings. The EMG and report by the neurologist do not show radiculopathy but other symptoms and objective testing do support the diagnoses, including absent or trace corresponding reflexes. He indicates how Claimant meets all six of the Official Disability Guidelines’ pre-operative surgical indications. Claimant provided evidence-based medicine evidence sufficient to contradict the determination of the IRO and the preponderance of the credible evidence is contrary to the decision of the IRO.

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), Claimant sustained a compensable injury.
 - D. The Independent Review Organization board certified neurological surgeon determined Claimant should not have a posterior lumbar interbody fusion at L3/4 with decompression laminectomy, facetectomy and discectomy with three days inpatient stay.
2. Self-Insured delivered to Claimant a single document stating the true corporate name of Self-Insured, and the name and street address of Self-Insured's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2.
3. A posterior lumbar interbody fusion at L3/4 with decompression laminectomy, facetectomy and discectomy with three days inpatient stay 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 a posterior lumbar interbody fusion at L3/4 with decompression laminectomy, facetectomy and discectomy with three days inpatient stay is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is entitled to a posterior lumbar interbody fusion at L3/4 with decompression laminectomy, facetectomy and discectomy with three days inpatient stay for the compensable injury of (Date of Injury).

ORDER

Self-Insured is 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 **(SELF-INSURED)** and the name and address of its registered agent for service of process is

**SELF-INSURED
(STREET ADDRESS)
(CITY), TEXAS (ZIP CODE)**

Signed this 11th day of October, 2013.

KEN WROBEL
Hearing Officer