APPEAL NO. 080812-s
FILED JULY 25, 2008

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 29, 2008. The hearing officer resolved the disputed issue by deciding that the preponderance of the evidence is contrary to the decision of the Independent Review Organization (IRO). The appellant (carrier) appealed, arguing that the evidence does not support the hearing officer's decision. The carrier also contends that the hearing officer failed to consider the requirement of evidence-based medicine guidelines. The respondent (claimant) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable spinal injury on _____, and that the IRO determined that the claimant should not have spinal surgery. The evidence reflects that the claimant underwent lumbar spinal surgery prior to her compensable injury. The claimant had additional lumbar spinal surgeries after her compensable injury. In evidence is an operative report dated February 2, 2000, which describes the procedure performed as a revision lumbar laminectomy with excision of a herniated nucleus pulposus and foraminotomy on the right at L5-S1. Also in evidence is an operative report dated May 22, 2003, that describes the procedure performed as a revision right lumbar hemilaminectomy, foraminotomy and nerve root decompression on both the right and left at L5-S1 as well as a fusion at L5-S1. The record reveals that the claimant's back condition has also been treated with epidural steroid injections, physical therapy, and medication.

The IRO decision by an orthopedic surgeon dated February 10, 2008, upheld the carrier's denial of the requested surgical procedure which included fusion of L4-5 and L5-S1, and noted that the claimant had been denied this surgery through the workers' compensation system on at least three prior occasions, June 6, 2006, December 14, 2007, and January 14, 2008. The IRO stated that the claimant had failed back syndrome and listed the factors which indicated a poor result which included multiple surgeries, previous failures to achieve even six months of relief, and surgery within the compensation system. The screening criteria or other clinical basis used by the IRO to make the decision was identified as the Official Disability Guidelines-Treatment in Workers' Comp published by Work Loss Data Institute (ODG).[1] The ODG specifically lists prior low back operations and surgery in the workers' compensation system as

[1] We note that Rule 137.100 provides that the health care providers shall provide treatment in accordance with the current edition of the ODG, excluding return to work pathways, unless the treatment(s) or service(s) require(s) preauthorization in accordance with Rule 134.600 of this title (relating to Preauthorization, Concurrent Review and Voluntary Certification of Health Care) or Rule 137.300 of this title (relating to Required Treatment Planning). Rule 137.100(h) provides that Rule 137.100 applies to all health care provided on or after May 1, 2007.

predictors of poor results from the surgery. Additionally, the ODG provides that segmental instability may be an indication for spinal fusion but such segmental instability must be objectively demonstrable. The ODG states that 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.

The carrier cited former rule 28 TEX. ADMIN. CODE § 133.308(w) (Rule 133.308(w)),[2] which provided that in all appeals from review of prospective or retrospective necessity disputes, the IRO decision has presumptive weight.[3] In Appeals Panel Decision (APD) 021958-s, decided September 16, 2002, the Appeals Panel held that the presumptive weight provision in Rule 133.308(v) (later redesignated as Rule 133.308(w)) is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption; that the IRO decision is the decision which should be adopted, unless rebutted by contrary evidence. The Appeals Panel has held that whether an IRO decision is supported by a preponderance of the evidence involves a fact issue for the hearing officer to resolve as the sole judge of the weight and credibility of the evidence. APD 032359, decided October 21, 2003.

However, 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. Section 401.011(22-a) defines "[h]ealth care reasonably required" 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: (A) evidence-based medicine; or (B) if that evidence is not available, generally accepted standards of medical practice recognized in the medical community. Section 401.011(18-a) defines "[e]vidence-based medicine" as 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 claimant's treating doctor, Dr. F, testified at the CCH that the proposed surgery would alleviate the claimant's back and leg pain. Further, the claimant's treating doctor testified that in his opinion the claimant had vertical instability and met the criteria in the ODG for the proposed surgical procedure. The treating doctor

[2] We note that Rule 133.308 effective December 31, 2006, omitted the provision that stated the IRO decision has presumptive weight in all appeals from review of prospective or retrospective necessity disputes.

[3] We note the current version of Rule 133.308(t) provides that in a CCH, the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medicine. Rule 133.308(a)(1) provides this section applies to the independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes that is remanded to the Texas Department of Insurance, Division of Workers' Compensation (Division) or filed on or after May 25, 2008. Except as provided in paragraph (2) of this subsection, dispute resolution requests filed prior to May 25, 2008, shall be resolved in accordance with the statutes and rules in effect at the time the request was filed. Paragraph (2) provides paragraph (1) of subsection (t) of this section applies to the independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes for a dispute resolution request that is: (A) pending for adjudication by the Division on September 1, 2007; (B) remanded to the Division on or after September 1, 2007; or (C) filed on or after September 1, 2007.

acknowledged that the chance of success is lower in relation to the number of previous procedures but he was confident that he can achieve a good result for the claimant. Dr. T, an orthopedic surgeon, testified on behalf of the carrier. Dr. T testified that he is not aware of any article which was published in English literature which defines any parameters of vertical instability. Dr. T contends that this concept is investigational and without scientific basis. Dr. F explained what he meant by vertical instability but he did not cite any authority for the concept. Dr. T testified that the medical evidence reveals that the claimant has had inconsistency with her imaging studies and with what her symptoms and signs show.

The hearing officer specifically found that spinal surgery is medically necessary treatment for the claimant's spinal injury. Dr. F testified that the post-lumbar myelogram CT confirmed that the claimant had a fusion that was not healed. However, the post-lumbar myelogram CT which he relied on was dated May 12, 2004. Dr. T testified that it is not the standard of care to rely on such a diagnostic test performed in 2004 to propose a surgical procedure in 2008. Dr. T testified citing a published study performed by Brux that took people whose spinal surgery failed and were then treated with the biopsychosocial approach. Dr. T testified that the people who were treated with the biopsychosocial approach did better than those that underwent another operation. The hearing officer's decision is against the great weight and preponderance of the evidence and requires reversal. The claimant failed to present evidence consistent with the requirements of Section 401.011(22-a) to establish that the preponderance of the evidence is contrary to the decision of the IRO.

We reverse the hearing officer's decision that the preponderance of the evidence is contrary to the decision of the IRO and render a new decision that the preponderance of the evidence is not contrary to the decision of the IRO.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Cynthia A. Brown
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge