MEDICAL CONTESTED CASE HEARING NO. 11005
M6-10-26670-01

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 August 27, 2010, 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 a right elbow extensor origin repair and acutaneous muscle transfer for the compensable injury of _____?

PARTIES PRESENT

Petitioner/Claimant appeared and was represented by CS, attorney. Respondent/Carrier was represented by MM, attorney.

BACKGROUND INFORMATION

On _____, Claimant sustained a compensable injury to his right shoulder and right elbow after lifting a heavy piece of machinery. As a result of the compensable injury, Claimant has undergone numerous surgeries to his right shoulder and elbow. On August 24, 2006, Claimant was diagnosed with right elbow lateral epicondylitis and underwent an extensor carpi radialis brevis release, along with a partial epicondylectomy, and anconeus muscle transfer. The medical records submitted by the Claimant indicate that the Claimant continued to experience no relief of pain following the surgery. Claimant has continued to seek medical treatment and receive medication for his ongoing symptoms. Claimant's treating physician has recommended a right elbow extensor origin repair (lateral epicondylitis release) and acutaneous muscle transfer. The request for proposed treatment was denied by the Carrier/Respondent (Carrier) and submitted to an IRO who upheld the Carrier's denial.

The IRO reviewer, specializing in orthopedic surgery and trauma, provided a detailed understanding of the Claimant's medical history and noted that Claimant had undergone extensive conservative treatment and noted Claimant's continued complaints of pain. The reviewer was aware that Claimant had undergone numerous injections, physical therapy, bracing and medication.

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 (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."

It should be noted that the proposed right elbow extensor origin repair and acutaneous muscle transfer are not separately listed under the *ODG,* but are recognized under surgery for epicondylitis found in the elbow section of the *ODG*. The *ODG* states as follows:

> Under study. Almost all patients respond to conservative measures and do not require surgical intervention. Treatment involves rest, ice, stretching, strengthening, and lower intensity to allow for maladaptive change. Any activity that hurts on extending or pronating the wrist should be avoided. With healing, strengthening exercises are recommended. Patients who are recalcitrant to six months of conservative therapy (including corticosteroid injections) may be candidates for surgery. There currently are no published controlled trials of surgery for lateral elbow pain. Without a control, it is impossible to draw conclusions about the value of surgery. Generally, surgical intervention may be considered when other treatment fails, but over 95% of patients with tennis elbow can be treated without surgery. (Buchbinder-Cochrane, 2002) (California, 1997) (Piligian, 2000) (Foley, 1993) (AHRQ, 2002) (Theis, 2004) (Jerosch, 2005) (Balk, 2005) (Sennoune, 2005) (Szabo, 2006) Disappointing results of surgery were found in litigants with epicondylitis. (Kay, 2003) (Balk, 2005) Surgery is not very common for this condition. In workers' compensation, surgery is performed in only about 5% cases. (WLDI, 2007) For the minority of people with lateral

> epicondylitis who do not respond to nonoperative treatment, surgical intervention is an option. The surgical techniques for treating lateral epicondylitis can be grouped into three main categories: open, percutaneous, and arthroscopic. Although there are advantages and disadvantages to each procedure, no technique appears superior by any measure. Therefore, until more randomized, controlled trials are done, it is reasonable to defer to individual surgeons regarding experience and ease of procedure. (Lo, 2007)

The IRO noted that Claimant has a "long standing history of lateral epicondylitis and has failed not only extensive conservative measures, but also two surgical procedures." He further noted that the proposed surgery was still under study and summarized the literature for surgery of recalcitrant lateral epicondylitis. The reviewer also noted his concern of lateral elbow instability resulting from complications of aggressive surgical debridement since the lateral collateral ligaments and the annular ligament would be susceptible to injury. He further opined that "a repeat anconeus transfer would not succeed and in this case, there most likely is extensive scar tissue which would make the transfer difficult, if not impossible, due to lack of available tissue." The ODG does state that "until more randomized, controlled trials are done, it is reasonable to defer to individual surgeons regarding experience and ease of procedure." Claimant's treating physician did not testify, but wrote a report, and cited a study found in the Campbell Operative Orthopedic book. He noted that the study reported "94% good results and recommended this procedure for patient's who continue to have persistent pain and are unable to perform normal activities of (sic) conservative treatment." However, the treating physician failed to show that the Campbell Operative Orthopedic book, or the study cited within it, is currently used as an authoritative source in the medical profession. There was no evidence offered of the quality of the study cited, the methodology of the study cited, or the date of the study. In determining the weight to be given to expert testimony, a trier of fact must first determine if the expert is qualified to offer it. The trier of fact must then determine whether the opinion is relevant to the issues at bar and whether it is based upon a solid foundation. An expert's bald assurance of validity is not enough. *See* Black vs. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999); E.I. Du Pont De Nemours and Company, Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995). Evidence is considered 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; 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). A medical doctor is not automatically qualified as an expert on every medical question and an unsupported opinion has little, if any, weight. Black v. Food Lion, Inc., 171 F.3rd 308 (5th Cir. 1999). Under the circumstances presented, the evidence was insufficient and failed to show objective evidence of the underlying validity of the treating physician's opinion contrary to the IRO decision and it is not entitled to any substantive weight.

It should be noted that the Claimant's treating doctor failed to address the IRO reviewer's concern that a repeat anconeus transfer would not succeed, especially in light of the fact that Claimant had already undergone a similar procedure. Based on the evidence presented, Claimant failed to contradict the determination of the IRO and the preponderance of the evidence is not 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 _____, Claimant was the employee of (Employer).

   C. On _____, Claimant sustained a compensable 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. The IRO determined that the requested services were not reasonable and necessary health care services for the compensable injury of _____.

4. The requested medical procedure is currently under study.

5. The preponderance of the evidence based medical evidence is not contrary to the IRO decision.

6. The right elbow extensor origin repair and acutaneous muscle transfer is not health care reasonably required for the compensable injury of _____.

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 a right elbow extensor origin repair and acutaneous muscle transfer is not health care reasonably required for the compensable injury of _____.

DECISION

Claimant is not entitled to a right elbow extensor origin repair and acutaneous muscle for the compensable injury of _____.

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 **PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY,** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218

Signed this 13th day of September, 2010.

Teresa G. Hartley
Hearing Officer