MEDICAL CONTESTED CASE HEARING NO. 19005

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 Administrative Law Judge determines that Claimant is not entitled to Functional Capacity Evaluation x 12 units for the compensable injury of (Date of Injury).

STATEMENT OF THE CASE

On February 20, 2019, Teresa G. Hartley, a Division Administrative Law Judge, 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 the Claimant is not entitled to Functional Capacity Evaluation x 12 units for the compensable injury of (Date of Injury)?

PARTIES PRESENT

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

EVIDENCE PRESENTED

The following witnesses testified:

For Petitioner/Claimant: Claimant.

For Respondent/Carrier: None.

The following exhibits were admitted into evidence:

Administrative Law Judge's Exhibits: ALJ-1 and ALJ-2.

Petitioner/Claimant's Exhibits: C-1 and C-6.

Respondent/Carrier's Exhibits: CR-A through CR-G.

DISCUSSION

Claimant sustained a compensable injury on (Date of Injury). As a result of this injury, Claimant has undergone medical treatment, including physical therapy. Claimant's treating doctor has

recommended a Functional Capacity Evaluation to determine Claimant's work abilities, which was denied by the Carrier and appealed to an IRO.

The IRO reviewer, identified as an orthopedic surgeon, upheld Carrier's denial and determined that the requested evaluation was not medically necessary. The IRO reviewer noted that the medical records indicated that physical therapy continued to be recommended by Claimant's treating physician and that the treating physician did not believe that Claimant has reached maximum medical improvement. The IRO reviewer noted that the Official Disability Guidelines (ODG) "supports a functional capacity evaluation as an option in select circumstances including when an individual has reached or is about to reach maximum medical improvement and permanent disability ratings will be required or when there has been multiple previous unsuccessful return to work attempts." The IRO reviewer concluded that, based on the records available for review, medical necessity for the Functional Capacity Evaluation has not been established.

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."

The ODG notes the following Guidelines for performing a Functional Capacity Evaluation:

If a worker is actively participating in determining the suitability of returning to a specifically identified job, then FCE is much more likely to prove meaningful. FCEs are ineffective when there is little collaboration and specific goal-oriented direction. It is critical to provide as much detail as possible regarding the potential and available job to the assessor. Less comprehensive protocols for job type and injury-region specific FCE are far more useful, reliable, and time-efficient than general whole body assessments, unless multiple injuries are involved. The FCE report must be made available to all return to work participants, specifically and clearly documenting any and all signs of sub-maximum effort due to pain, poor motivation, or psychological issues.

Consider a one-time FCE if the above considerations are met AND

1) Case management is hampered by complex issues such as
    - Prior unsuccessful RTW attempts.
    - Conflicting medical reporting on precautions and/or fitness for a modified job.
    - Injuries that require a detailed exploration of a worker's abilities.
2) Timing is appropriate when the following apply:
    - Close or at MMI/all key medical reports provided.
    - Permanent complex work restrictions are required.
    - Additional/secondary conditions are clarified.

Do not proceed with an FCE if

- The sole purpose is to determine a worker's effort or compliance.
- The worker has returned to work, and an ergonomic assessment has not been arranged.
- The purpose of the assessment is to pre-screen for occupational rehabilitation or predict future reinjury.
- The diagnosis is a whiplash-associated disorder (cervical sprain/strain).

Both job-specific and comprehensive Functional Capacity Evaluations (FCEs) can be potentially valuable tools when used for clinical decision-making for more complicated and protracted work injuries. However, FCE is a complex, variable, and multifaceted process, with inadequate evidence regarding the reliability and validity of the component tests, so further quality research

is needed. (*Lechner, 2002*) (*Harten, 1998*) (*Malzahn, 1996*) (*Tramposh, 1992*) (*Isernhagen, 1999*) (*Wyman, 1999*) In theory, FCE provides a more objective functional snapshot for disability managers, occasionally being invaluable for return to work (RTW) assessment. (*Lyth, 2001*) There are numerous controversial issues, such as inconsistent measurement of endurance and sub-maximum effort. (*Schultz-Johnson, 2002*) Low to moderate levels of correlation were observed between "self-reporting" and the Isernhagen Work Systems FCE measures. (*Reneman, 2002*) Inconsistencies of patient performance across sessions is considered to be the greatest source of FCE measurement variability, but overall test-retest reliability has been shown to be relatively good, while inter-rater reliability can range from good to excellent. (*Gross, 2002*) FCE lifting subtest results correlated reasonably well with general RTW and functional level for patients with work-related chronic low back symptoms. Grip force testing was useless regarding RTW. (*Matheson, 2002*) Because validity and reliability data remain limited and because FCEs are generally time-consuming and expensive, such comprehensive testing cannot be routinely recommended. (*Rivier, 2001*) Ten different FCE systems were analyzed with recommendations that all suppliers need to further validate and refine their systems. (*King, 1998*) Compared with patients who gave maximal effort during the FCE, patients who did not exert maximal effort reported significantly more anxiety, depression, and self-reported disability. The latter group also had lower expectations regarding their FCE performance and for returning to work. (*Kaplan, 1996*) Safety reliability was considered to be high, which suggests that therapists can judge safe lifting methods during FCE. (*Smith, 1994*) Since comprehensive FCE is a burdensome clinical tool in terms of time and cost, a randomized controlled trial (RCT) evaluated the effectiveness of a short-form FCE protocol, concluding that it reduced time of assessment by over 40% while having a similar effect on recovery outcomes compared to a standard FCE. (*Gross, 2007*) In an effort to improve cost efficiency and reduce time, FCEs should not be comprehensive, but only a few functional tests should be included, based on medical condition (upper extremity, spine, lower extremity), identifying activities specifically limited by that condition, and testing only for those restricted activities. (*Gouttebarge, 2010*) Job-specific FCEs for 713 patients with non-specific low back pain had 80% predictive validity of maintained employment status at 3 months. (*Cheng, 2010*) Credibility of both the FCE and the FCE evaluator is critical, because if the evaluee complains of evaluator bias, lack of expertise, or poor professional conduct, the FCE will be considered useless. (*Genovese, 2009*)

Recent research: A Cochrane systematic review (SR) examined all available RCTs specifically addressing the effects of FCE in preventing subsequent occupational re-injury. The overall quality of evidence was low, and they found zero studies comparing FCE to no intervention. The authors concluded there was no evidence supporting any FCE effectiveness regarding future injury prevention; there also proved to be no additional studies available 6 years later, and the authors have withdrawn from making future updates to the systematic review due to the lack of studies. (*Mahmud, 2010*) (*Mahmud, 2016*) FCE performed within 6 to 12 weeks following whiplash-associated disorders (WADs) grades I and II did not predict future work capacity (WC), whereas time course, mother language, WC at baseline, and self-reported disability did

predict future WC. (*Trippolini, 2014*) A group of 354 patients with chronic disabling musculoskeletal disorders completed FCEs at admission and discharge from a functional restoration rehabilitation program (e.g., Work Hardening), with 96% improving their physical demand level (PDL) and 56% able to achieve the lifting requirements of their job of injury due to quantitative strength gains of 50%. Improvements in FCE determined PDL were predictive of work return at discharge and work retention 1 year later. (*Fore, 2015*) A multi-center prospective German cohort study of 198 patients supported positive predictive validity of crude and adjusted FCE information regarding sustained return-to-work at 3 months. (*Bühne, 2018*)

An SR of 18 moderate-to-good quality studies including 4,113 patients (median follow-up, 12 months) concluded there was strong evidence that some individual performance-based measures, especially lifting tests, were predictive of work participation for musculoskeletal disorders. (*Kuijer, 2012*) An SR of WorkWell (Isernhagen Work Systems) FCEs concluded that further research is required to determine reliability of many of its tests due to inconsistent findings and lack of data; however, weight handling and strength tests demonstrated consistently acceptable reliability. (*Bieniek, 2014*) An RCT compared FCEs using WorkWell with functional interviews conducted by specially trained FCE clinicians collecting self-report information only, without measurements. Even though FCE patients demonstrated somewhat higher work capacity than those interviewed, no ultimate outcome differences were observed. RTW results were the same whether the injured worker's capability had been assessed using a full two-day FCE, or with a much shorter interview by an expert listener. The authors concluded that FCE does not appear to enhance outcomes (improved RTW rates or functional work levels at follow-up) when added to occupational rehabilitation. (*Gross, 2013*) A related follow-up RCT compared FCE with functional interviewing, concluding that the interview process actually resulted in improved RTW rates or functional work levels at follow-up. (*Gross, 2014*)

Applying normative values for FCEs is controversial for the assessment of work ability, sometimes leading to over-interpretation of results, with potential harmful consequences for patients. (*Soer, 2014*) Another study evaluated the safety, reliability, and validity of the EPIC Lift Capacity test, specifically examining the effects of age and gender on lift capacity. This examination is a safe and reliable test of lift capacity, and normative data are provided to allow comparison within age and gender categories. (*Matheson, 2014*) An SR of 10 studies compared 4 instruments/systems for the quality of their psychometric measures related to physical functional limitations, concluding that all 4 had notable limitations. The Roland-Morris Disability Questionnaire was recommended for its stronger validity and short time completion. (*Spanjer, 2011*) FCE rating of submaximal physical effort using observational criteria remains problematic, as demonstrated by a study of 21 raters of 18 video-recorded tests independently reviewed again 10 months later. Acceptable reliability scores ranged from only 38-67%, with better results for material handling tests than for ambulatory and postural tolerance tests. (*Trippolini, 2014*) These data contrast with a previous SR of 7 studies (only 3 with "good" methodological quality), which reported that submaximal effort could be detected 75% or more

of the time for chronic low back pain patients, either using a lumbar motion monitor or visual observations during FCE lifting tests. (*van der Meer, 2013*) Detection of submaximal effort and Waddell signs proved to be independent factors for poor lifting performance, with a 20-29% higher explained variance for the former and 3-6% for the latter. Both types of observation are recommended during quality FCE testing. (*Oesch, 2012*) The presence of Waddell signs in 33% of 198 patients with chronic non-specific low back pain resulted in significantly worse FCE performance and failure to achieve light-medium to medium work levels. (*Oesch, 2015*) Current hot-topic issues discussed at the bi-yearly Third International Functional Capacity Evaluation Research Meeting included protocol reliability and validity, specific injury populations, and inclusion of testing with the Heart Rate Reserve Method. (*Edelaar, 2018*)

Claimant failed to offer evidence-based medical evidence contrary to the determination of the IRO or to support the necessity for the requested evaluation. Based on the evidence presented, Claimant has not met the requirements in the ODG and she has failed to present evidence-based medical evidence sufficient to contradict the determination of the IRO. The preponderance of the evidence is not contrary to the IRO decision that Claimant is not entitled to Functional Capacity Evaluation x 12 units for the compensable injury of (Date of Injury).

The Administrative Law Judge 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 Safety National Casualty Corporation, Carrier.

   D. On (Date of Injury), 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 Administrative Law Judge's Exhibit Number 2.

3. The IRO determined that the proposed Functional Capacity Evaluation x 12 units was not medically necessary for the compensable injury of (Date of Injury).

4. Claimant does not meet the recommendations of the ODG for the recommended Functional Capacity Evaluation by her treating physician.

5. The Functional Capacity Evaluation x 12 units are 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. Claimant is not entitled to Functional Capacity Evaluation x 12 units for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to Functional Capacity Evaluation x 12 units for the compensable injury of (Date of Injury).

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 **SAFETY NATIONAL CASUALTY CORPORATION**, 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 27th day of February, 2019.

Teresa G. Hartley
Administrative Law Judge