

MEDICAL CONTESTED CASE HEARING NO. 19013

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 (DWC). For the reasons discussed herein, the Administrative Law Judge determines that Claimant is entitled to an exploration spinal fusion, neuroplasty of nerve roots and dura, bilateral foraminotomy at L5/S1, and spinal monitoring for the compensable injury of (Date of Injury).

STATEMENT OF THE CASE

On October 03, 2019, a medical contested case hearing was held 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 an exploration spinal fusion, neuroplasty of nerve roots and dura, bilateral foraminotomy at L5/S1, and spinal monitoring for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner/Claimant appeared and was assisted by CJ, ombudsman. Respondent/Carrier appeared and was represented by AS, attorney.

EVIDENCE PRESENTED

The following witnesses testified:

For Claimant: Claimant, JS, M.D.

For Carrier: No one

The following exhibits were admitted into evidence:

Administrative Law Judge's Exhibits ALJ-1 through ALJ-3

Claimant's Exhibits C-1 through C-12

Carrier's Exhibits CR-A through CR-D

BACKGROUND INFORMATION

Claimant testified that he injured his low back while working in a warehouse. He underwent his first lumbar surgery in March 2016. It was a three-level fusion. It did not help. He began treating with JS, M.D., in March 2017. In April 2019, Dr. S performed an L3-S1 laminectomy, an L4-S1 neuroplasty, an L3/4 and L5/S1 transforaminal lateral interbody fusion, and a posterolateral fusion from L3 to S1. Claimant's spinal monitoring during the surgery showed an increase in electrical activity during and immediately after the surgery. Claimant's condition after the surgery improved until about a month and a half after the surgery when he began to experience weakness in both legs. Dr. S referred Claimant out for an EMG on June 06, 2019, that came back positive for bilateral L5 and S1 radiculopathy. Dr. S requested the proposed procedure. Insurance Carrier's utilization review doctors denied the surgery because Claimant had not had any post-operative therapy. Dr. S requested the IRO. The IRO board certified orthopedic surgeon agreed with the utilization review doctors on the denial. Claimant requested a medical contested case hearing.

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 DWC 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 DWC has adopted treatment guidelines by DWC 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 DWC 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 ODG had no clear guidance with regard to an exploration spinal fusion. The terms "exploration" and "exploratory" were found once in the Low Back section. It was under Revision Surgery for Pseudoarthrosis. Under that heading, the ODG stated the following:

Diagnostic evaluation: A history and physical should be undertaken to rule out disease progression, infection, spinal implant failure, and adjacent segment degeneration. This is particularly important for patients who deny significant symptom relief postoperatively. Other sources of pain include that referred from the hip or sacroiliac joints. Neurologic status should be examined to rule out non-spinal pathology (such as multiple sclerosis or stroke). Vascular claudication should be ruled out. Lab studies should include a complete blood count with differential, erythrocyte sedimentation rate, and C-reactive protein. Dynamic flexion-extension radiographs are the imaging modality of choice, with MRI reserved only for indeterminate radiographical evaluation. CT exposes patients to dangerous ionizing radiation and should not be routinely used to "monitor" fusion progression. The gold standard for assessment is an open surgical exploration. Other factors to consider include overlying psychological issues. (*Chun, 2015*) (*Bederman, 2016*)

With respect to neuroplasty of nerve roots and dura, the ODG is relatively silent. It is only found in the Low Back section eight times. When it is found, neuroplasty is denoted as a percutaneous epidural neuroplasty, which is not what the procedure being recommended in this case. Specifically, under "Neuroplasty", the ODG states, "This topic is indexed as a common search term for guidelines hosted elsewhere. Click-through and see related topics field. See Percutaneous epidural neuroplasty."

With respect to the bilateral foraminotomy, this procedure is only listed twice. Like neuroplasty, under Foraminotomy, the ODG states, "This topic is indexed as a common search term for guidelines hosted elsewhere. Click-through and see related topics field. See Discectomy/laminectomy." Under Discectomy/laminectomy, foraminotomy is only listed as a surgical procedure. Specifically, the ODG only says, "Surgical decompression of a lumbar nerve root or roots may include the following procedures: discectomy or microdiscectomy (partial removal of the disc) and laminectomy, hemilaminectomy, laminotomy, or foraminotomy (providing access by partial or total removal of various parts of vertebral bone)."

While the IRO doctor checked that he used the ODG along with his clinical judgment to make his decision, he did not cite how or what section of the ODG he utilized. He noted Claimant had been followed for chronic low back and leg pain and was status post exploration of a prior spinal fusion with further decompression from L3 to S1 and transforaminal lumbar interbody fusion at L3/4 and L4/5 performed on April 08, 2019. He noted the post-operative CT results with post-operative changes from L3 to S1 with continuing stenosis and no changes at L2. He noted the EMG studies were consistent with the surgical history. He noted there was a lack of post-operative rehabilitative efforts. He found as of June 18, 2019, Claimant was stated to be improving and there was no specific rationale for performing further surgery. He did not see the potential benefits for further surgery outweighing the risks and did not find the surgery medically necessary. This was the extent of the IRO doctor's analysis.

Dr. S testified explaining that Claimant did not have post-operative physical therapy because he cannot do physical therapy. He is basically wheelchair bound. He is to the point that his autonomic nervous system is becoming affected, as exhibited by the discoloration in his feet and legs. Dr. S testified physical therapy would have been a waste of time. He explained surgery is the only treatment that will help Claimant and that his recommended surgery is within the generally accepted standard of medical care. He explained that during the April 08, 2019, surgery, he removed the stenotic features around the L3 and L4 vertebra and fused the mechanical problems at the L5/S1 levels. He testified Claimant did initially improve, as the IRO doctor mentioned, but that he then steadily declined as documented in the EMG. The EMG was not consistent with a surgical history, as claimed by the IRO doctor, as the spinal monitoring during the surgery indicated the nerve conduction was strong and clear. The post-surgical EMG showed Claimant's condition had changed and surgery was warranted. Dr. S believes Claimant developed post-surgical scar tissues, as evidenced by the EMG results, and that the only way to treat this condition is to surgically remove the scar tissue. He testified unless the scar tissue is removed and this surgery is performed, Claimant will become permanently wheelchair bound and his nerves will have no hope of regenerating.

Claimant met his burden of proof to overcome the IRO decision.

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 orthopedic surgeon determined Claimant should not have an exploration spinal fusion, neuroplasty of nerve roots and dura, bilateral foraminotomy at L5/S1, and spinal monitoring.
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. An exploration spinal fusion, neuroplasty of nerve roots and dura, bilateral foraminotomy at L5/S1, and spinal monitoring 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 an exploration spinal fusion, neuroplasty of nerve roots and dura, bilateral foraminotomy at L5/S1, and spinal monitoring is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is entitled to an exploration spinal fusion, neuroplasty of nerve roots and dura, bilateral foraminotomy at L5/S1, and spinal monitoring for the compensable injury of (Date of Injury).

ORDER

Carrier 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 **XL SPECIALTY 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, TEXAS 75201-3136.**

Signed this 04th day of October, 2019.

KEN WROBEL
Administrative Law Judge