

MEDICAL CONTESTED CASE HEARING NO. 13054

**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.

**ISSUE**

A medical contested case hearing was held on January 23, 2013 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 facet joint bilateral thoracic T7-T8 and thoracic T8-T9 epidural steroid injections (ESIs) with intravenous sedation for the compensable injury of (Date of Injury)?

**PARTIES PRESENT**

Claimant appeared and was assisted by WB, ombudsman. Carrier appeared and was represented by JL, attorney.

**EVIDENCE PRESENTED**

The following witnesses testified:

For Claimant: Claimant.

For Carrier: None.

The following exhibits were admitted into evidence:

Hearing Officer's Exhibits HO-1A, HO-1B, and HO-2.

Claimant's Exhibits C-1 through C-11.<sup>1</sup>

Carrier's Exhibits CR-A through CR-O.

**BACKGROUND INFORMATION**

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<sup>1</sup> Claimant's Exhibit C-2, p. 9 was admitted over Carrier's objection because good cause was found for its untimely exchange.

The evidence presented in the hearing revealed that Claimant sustained a compensable injury to include his lumbar spine, thoracic spine, and left shoulder on (Date of Injury) following a fall from a ladder while in the course and scope of his employment with (Employer). The evidence presented indicates that Claimant has received conservative treatment for the thoracic component of his compensable injury, including a right T7-T8 and T8-T9 facet block with fluoroscopy in September 2009 and a right T6, T7, and T8 cooled radiofrequency rhizotomy for the T7-T8 and T8-T9 facet joints in April 2011. The evidence indicated that the rhizotomy alleviated Claimant's thoracic pain complaints, but that his symptoms returned in approximately June 2012. Because of Claimant's success with the prior facet procedures, WB, M.D., a surgeon with whom Claimant treated at Texas Back Institute – Denton, requested the procedure made the basis of this medical necessity dispute – facet joint bilateral thoracic T7-T8 and thoracic T8-T9 epidural steroid injections (ESIs) with intravenous sedation. The necessity of this proposed procedure was denied after an initial review by a Utilization Review Agent (URA) and this denial was upheld by a second URA following a request for reconsideration. Dr. B then requested review by an Independent Review Organization (IRO). The IRO reviewer upheld the denial of the procedure based on the Official Disability Guidelines (ODG) and the reviewer's medical judgment, clinical experience and expertise in accordance with accepted medical standards. Claimant appealed the unfavorable decision of the IRO to this medical contested case hearing (MCCH).

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 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."

The Neck and Upper Back Chapter of the ODG provides as follows, in pertinent part, with regard to epidural steroid injections (ESIs):

Recommended as an option for treatment of radicular pain (defined as pain in dermatomal distribution with corroborative findings of radiculopathy).

The Low Back Chapter of the ODG provides as follows regarding facet joint injections (thoracic):

Not recommended. There is limited research on therapeutic blocks or neurotomies in this region, and the latter procedure (neurotomies) are not recommended. Recent publications on the topic of therapeutic facet injections have not addressed the use of this modality for the thoracic region. (Boswell, 2005) (Boswell2, 2005) Pain due to facet joint arthrosis is less common in the thoracic area as there is overall less movement due to the attachment to the rib cage. Injection of the joints in this region also presents technical challenge. A current non-randomized study reports a prevalence of facet joint pain of 42% in patients with chronic thoracic spine pain. This value must be put into perspective with the overall frequency of chronic pain in the cervical, thoracic and lumbar region. In this non-randomized study, 500 patients had 724 blocks. Approximately 10% of the blocks were in the thoracic region, with 35.2% in the cervical region and 54.8% in the lumbar. (Manchikanti, 2004)

With regard to diagnostic blocks for facet "mediated" pain, the ODG Low Back Chapter provides, as follows, in pertinent part, in the patient selection criteria under facet joint diagnostic blocks (injections):

The use of IV sedation (including other agents such as midazolam) may be grounds to negate the results of a diagnostic block, and should only be given in cases of extreme anxiety.

In the IRO report, the reviewer wrote that it was unclear, given Claimant's "significant response to prior rhizotomy procedures", why diagnostic injections were again being recommended. A fair reading of the IRO report also reveals that intravenous sedation would not be indicated in this

case because there was no evidence from the clinical record that Claimant had any significant anxiety regarding the procedure that would require such sedation.

Claimant, as the party challenging the IRO decision, has the burden of proof to overcome the IRO decision by a preponderance of evidence-based medical evidence. Evidence-based medical evidence entails the opinion of a qualified expert that has some basis in evidence-based medicine. Expert evidence is required in all medical necessity disputes and, though Claimant put forth highly credible testimony in the hearing, his lay testimony is not probative on questions requiring expert evidence, such as the inquiry into the medical necessity of the procedure at issue.

In support of his position, Claimant put forth a number of medical records and a letter dated January 18, 2013 from Dr. B. Dr. B's letter, however, does not adequately address the concerns about the proposed procedure raised by the IRO and does not explain, with sufficient reference to evidence-based medicine, how this procedure is health care reasonably required to treat Claimant's compensable injury of (Date of Injury). As noted earlier in this decision, Dr. B is a surgeon. In his letter dated January 18, 2013, Dr. B actually appears to defer to a physician board certified in another specialty – pain management – for an opinion on the “common practices” surrounding the procedure at issue in this case. Additionally, it should be noted that the ODG recommends ESIs as a treatment for radicular pain and the evidence presented was not persuasive to show that Claimant suffers from radiculopathy affecting his thoracic spine.

Based on the evidence presented, Claimant did not meet his burden of proof to overcome the decision of the IRO by a preponderance of evidence-based medical evidence. As a preponderance of the evidence is found not to be contrary to the decision of the IRO that facet joint bilateral thoracic T7-T8 and thoracic T8-T9 ESIs with intravenous sedation is not health care reasonably required for the compensable injury of (Date of Injury), Claimant is held not to be entitled to that procedure.

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, and sustained a compensable injury.

- C. On (Date of Injury), Employer provided workers' compensation insurance coverage through American Zurich Insurance Company.
  - D. This is a non-network claim.
  - E. The Independent Review Organization (IRO) determined that the health care at issue is not reasonably required for the compensable injury of (Date of 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. Facet joint bilateral thoracic T7-T8 and thoracic T8-T9 epidural steroid injections (ESIs) with intravenous sedation is 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. The preponderance of the evidence is not contrary to the decision of the IRO that facet joint bilateral thoracic T7-T8 and thoracic T8-T9 epidural steroid injections (ESIs) with intravenous sedation is not health care reasonably required for the compensable injury of (Date of Injury).

### **DECISION**

Claimant is not entitled to facet joint bilateral thoracic T7-T8 and thoracic T8-T9 ESIs with intravenous sedation for the compensable injury of (Date of Injury).

### **ORDER**

Carrier is not liable for the benefits at issue in this hearing, and it is so ordered. Claimant remains entitled to medical benefits for the compensable injury in accordance with §408.021.

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

**CORPORATION SERVICE COMPANY  
211 EAST 7th STREET, #620  
AUSTIN, TEXAS 78701-3218**

Signed this 30th day of January, 2013.

Jennifer Hopens  
Hearing Officer