

MEDICAL CONTESTED CASE HEARING NO. 20007

**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 (DWC) adopted thereunder. For the reasons discussed herein, the Administrative Law Judge (ALJ) determines that:

Claimant is not entitled to the requested L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days.

**STATEMENT OF THE CASE**

A contested case hearing was held on January 16, 2020, with the record closing on February 6, 2020, 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 L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days for the compensable injury of (Date of Injury)?

The record was held open to obtain substitute exhibits for unreadable exhibits and to obtain a stipulation. The records were received and added to Carrier's Exhibit CR-3 as pages 55 through 79. The record was closed on February 6, 2020.

**PARTIES PRESENT**

Petitioner/Claimant (Claimant) was present, and represented by LT, attorney.

Respondent/Carrier (Carrier) appeared and was represented by BJ, attorney.

**EVIDENCE PRESENTED**

The following witnesses testified:

For: DH.

For Carrier: None.

The following exhibits were admitted into evidence:

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

Claimant's Exhibits: C-1 through C-10.

Carrier's Exhibits: CR-A through CR-J.

## **DISCUSSION**

Claimant testified that he was employed as a plumber by Employer. According to Claimant he sustained a compensable injury on (Date of Injury), when he was lifting a hot water tank upstairs for an installation. The parties stipulated that Claimant sustained a compensable injury on (Date of Injury), and that the compensable injury extends to and includes a lower back strain, radiculopathy, lumbar region intervertebral disc displacement, and L4-L5 disc herniation. Claimant received care at (Provider) and his treating doctor was SB. Dr. B made several referrals. Dr. NS told Claimant he needed surgery and a surgery for a micro discectomy was approved, but Claimant sought a second opinion.

Dr. KK, a referral doctor recommended a different surgery and requested prior approval of L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days. Claimant received notification of adverse determination for this procedure dated April 5, 2019. It was noted that in this case an MRI dated March 12, 2019, showed there was mild disc space narrowing, fluid in the facet joints, a stable circumferential disc bulge, a stable central annular tear and a stable superimposed 5 by 12 by 14 mm central disc extrusion (herniation). It was stated that the presented objective findings were limited in order to necessitate the need for surgery. It was also noted that there was no documentation of the presence or absence of identified psychological barriers known to preclude post-operative recovery.

Claimant also received a Notice of Reconsideration Adverse Determination from Coventry Health Care Workers' Compensation, Inc. dated May 23, 2019, denying the request for L4-L5 anterior lumbar interbody fusion; L4-L5 laminectomy, L4-L5 posterior fusion and inpatient stay for 4 days. It stated that the proposed treatment does not meet medical necessity guidelines. It also stated that there was no evidence of any significant spondylolisthesis or motion segment instability at L4-L5 that would support proceeding with lumbar spinal fusion in addition to decompression. It was also noted that ODG does not recommend lumbar fusion to address disc herniation or radiculopathy only.

Upon appeal of the adverse determination the Department of Insurance assigned Medical Evaluators of Texas ASO, LLC as the Independent Review Organization (IRO). The IRO undertook the review. The case was reviewed by a physician who is board certified in

Orthopedic Surgery and currently licensed and practicing in Texas. Notice of the IRO decision was sent to all of the parties on July 3, 2019. The reviewing physician is a board certified orthopedic surgeon. The IRO's reviewing physician upheld the prior adverse determination.

The IRO noted that according to Official Disability Guidelines (ODG) the criteria for lumbar spinal fusion require evidence of spondylolisthesis with at least instability, and or symptomatic radiculopathy and/or symptomatic spinal stenosis. The reviewer stated that in this case documentation revealed that Claimant's imaging studies showed evidence of L4-5 degenerative disc disease, disc herniation and stenosis, but no evidence of spondylolisthesis or instability.

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 for the requested procedures indicates the following:

Patient Selection Criteria for Lumbar Spinal Fusion:

(A) *Recommended* as an option for the following conditions with ongoing symptoms, corroborating physical findings and imaging, and after failure of non-operative treatment (unless contraindicated, e.g., acute traumatic unstable fracture, dislocation, spinal cord injury) subject to criteria below:

- (1) Spondylolisthesis (isthmic or degenerative) with at least one of these:
  - (a) instability, and/or
  - (b) symptomatic radiculopathy, and/or
  - (c) symptomatic spinal stenosis;
- (2) Disc herniation with symptomatic radiculopathy undergoing a third decompression at the same level;
- (3) Revision of pseudoarthrosis (single revision attempt);
- (4) Unstable fracture;
- (5) Dislocation;
- (6) Acute spinal cord injury (SCI) with post-traumatic instability;
- (7) Spinal infections with resultant instability;
- (8) Scoliosis with progressive pain, cardiopulmonary or neurologic symptoms, and structural deformity;
- (9) Scheuermann's kyphosis;
- (10) Tumors.

(B) *Not recommended* in workers' compensation patients for the following conditions:

- (1) Degenerative disc disease (DDD);
- (2) Disc herniation;
- (3) Spinal stenosis without degenerative spondylolisthesis or instability;
- (4) Nonspecific low back pain.

(C) *Instability criteria*: Segmental Instability (objectively demonstrable) - Excessive motion, as in isthmic or degenerative spondylolisthesis, surgically induced segmental instability and mechanical intervertebral collapse of the motion segment and advanced degenerative changes after surgical discectomy, with relative angular motion greater than 15 degrees L1-2 through L3-4, 20 degrees L4-5, 25 degrees L5-

S1. Spinal instability criteria include lumbar inter-segmental translational movement of more than 4.5 mm. (*Andersson, 2000*) (*Luers, 2007*) (*Rondinelli, 2008*)

- (D) After failure of two discectomies on the same disc [(A)(2) above], fusion may be an option at the time of the third discectomy, which should also meet the ODG criteria. (See ODG Indications for Surgery™ -- Discectomy.)
- (E) Revision Surgery for failed previous fusion at the same disc level [(A)(3) above] if there are ongoing symptoms and functional limitations that have not responded to non-operative care; there is imaging confirmation of pseudoarthrosis and/or hardware breakage/malposition; and significant functional gains are reasonably expected. 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. Workers compensation and opioid use may be associated with failure to achieve minimum clinically important difference after revision for pseudoarthrosis (*Djurasovic, 2011*) There is low probability of significant clinical improvement from a second revision at the same fusion level(s), and therefore multiple revision surgeries at the same level(s) are not supported.
- (F) *Pre-operative clinical surgical indications* for spinal fusion should include all of the following:
  - (1) All physical medicine and manual therapy interventions are completed with documentation of reasonable patient participation with rehabilitation efforts including skilled therapy visits, and performance of home exercise program during and after formal therapy. Physical medicine and manual therapy interventions should include cognitive behavioral advice (e.g., ordinary activities are not harmful to the back, patients should remain active, etc.);
  - (2) X-rays demonstrating spinal instability and/or myelogram, CT-myelogram, or MRI demonstrating nerve root impingement correlated with symptoms and exam findings;
  - (3) Spine fusion to be performed at one or two levels;
  - (4) Psychosocial screen with confounding issues addressed; the evaluating mental health professional should document the presence and/or absence of identified psychological barriers that are known to preclude post-operative recovery;
  - (5) For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing; (*Colorado, 2001*) (*BlueCross BlueShield, 2002*)
  - (6) There should be documentation that the surgeon has discussed potential alternatives, benefits and risks of fusion with the patient;

(7) For average hospital LOS after criteria are met, see Hospital length of stay (LOS).

**ODG hospital length of stay (LOS) guidelines:**

Discectomy (*ICD 80.51 - Excision of intervertebral disc*)

Actual data -- median 1 day; mean 2.1 days ( $\pm 0.0$ ); discharges 109,057; charges (mean) \$26,219

Best practice target (no complications) -- *Outpatient*

Laminectomy (*ICD 03.09 - Laminectomy/laminotomy for decompression of spinal nerve root*)

Actual data -- median 2 days; mean 3.5 days ( $\pm 0.1$ ); discharges 100,600; charges (mean) \$34,978

Best practice target (no complications) -- *1 day*

*Note: Approximately 6% of discharges paid by workers' compensation.*

Lumbar Fusion, posterior (*ICD 81.08 - Lumbar and lumbosacral fusion, posterior technique*)

Actual data -- median 3 days; mean 3.9 days ( $\pm 0.1$ ); discharges 161,761; charges (mean) \$86,900

Best practice target (no complications) -- *3 days*

*Note: Approximately 15% of discharges paid by workers' compensation.*

Lumbar Fusion, anterior (*ICD 81.06 - Lumbar and lumbosacral fusion, anterior technique*)

Actual data -- median 3 days; mean 4.2 days ( $\pm 0.2$ ); discharges 33,521; charges (mean) \$110,156

Best practice target (no complications) -- *3 days*

The IRO reviewer wrote that according to ODG, the criteria for lumbar spinal fusion requires evidence of spondylolisthesis with at least instability, and/or symptomatic radiculopathy, and /or symptomatic spinal stenosis. In this case the documentation revealed that Claimant's imaging studies showed evidence of L4-L5 degenerative disc disease (DDD) disc herniation and stenosis, but no evidence of spondylolisthesis or instability. Further according to ODG, lumbar spinal fusion is not recommended for degenerative disc disease, disc herniation, spinal stenosis without degenerative spondylolisthesis, or instability and nonspecific low back pain. The review noted the treating provider did not document any explanation for the need of fusion in documentation submitted for review. The review concluded that since the lumbar surgery is not indicated, the

four day inpatient stay is also not medically necessary. The IRO decision was further supported by a written opinion by BS MD.

Claimant testified that Dr. K did not cooperate in helping him with his appeal. He testified that Dr. K only printed a one page document. Claimant placed in evidence a one page document dated December 4, 2019 from (Provider). It is not signed by Dr. K and does not offer any opinion based on evidence based medicine that is contrary to the decision of the IRO. For the most part it is a recitation of the MRI findings and does not opine that the requested procedures are medically necessary or appropriate. Claimant admitted in argument that he did not have much in the way of evidence that is contrary to the IRO decision. The other medical records in evidence are not persuasive and do not opine that the requested procedure is medically necessary, is health care reasonable required or otherwise contradict the IRO decision.

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. Claimant did not present persuasive evidence-based medical evidence to support his position. As the preponderance of the evidence is found not to be contrary to the decision of the IRO that the L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days are not health care reasonably required for the compensable injury of (Date of Injury), Claimant is held not to be entitled to those procedures.

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. The Texas Department of Insurance, Division of Workers' Compensation has jurisdiction to hear this matter.
  - B. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
  - C. On (Date of Injury), Claimant was the employee of (Employer), Employer.
  - D. On (Date of Injury), Employer provided workers' compensation insurance coverage with Texas Mutual Insurance Company, Carrier.
  - E. On (Date of Injury), Claimant sustained a compensable injury.

- F. Claimant requested preauthorization for L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days.
  - G. The Independent Review Organization upheld Carrier's denial of preauthorization for L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days.
  - H. The compensable injury of (Date of Injury), extends to and includes a lower back strain, radiculopathy, lumbar region intervertebral disc displacement, and L4-L5 disc herniation.
  - I. The Texas Department of Insurance appointed Medical Evaluators of Texas ASO, LLC as the Independent Review Organization.
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 preponderance of the evidence is not contrary to the decision of the Independent Review Organization that Claimant is not entitled to the requested L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days.

### **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 the requested L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days.

### **DECISION**

Claimant is not entitled to the requested L4-L5 anterior lumbar interbody fusion, L4-L5 laminectomy, L4-L5 posterior fusion (cpt 22558, 22845 22612, 22840, 63047, 20930), and inpatient stay for 4 days.



**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 **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is:

**RICHARD J. GERGASKO  
TEXAS MUTUAL INSURANCE COMPANY  
2200 ALDRICH STREET  
AUSTIN, TEXAS 78723**

Signed this 10<sup>th</sup> day of February, 2020.

Christopher M. Maisel  
Administrative Law Judge