APPEAL NUMBER 94960
FILED SEPTEMBER 1, 1994

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (City), Texas on June 28, 1994, before hearing officer. The appellant (SM), hereinafter claimant, injured his back on _____, in the course and scope of his employment by (Employer). The issue at the hearing was whether claimant could reopen a decision concerning his impairment rating and maximum medical improvement (MMI) status due to a substantial change of condition. The claimant's impairment rating and MMI had been decided in a prior contested case hearing decision, rendered September 22, 1993, which was not appealed. Claimant asserted he was nevertheless entitled to reopen the issue following surgery on his back, which he asserted was a substantial change in condition.

The hearing officer determined that the Texas Workers' Compensation Commission (Commission) could not reopen claimant's case based upon alleged substantial change of condition because the previous hearing decision which litigated the issues of impairment and MMI had become final.

The claimant appeals this decision, arguing that because the 1989 Act expressly grants the courts, on judicial review of Commission decision, authority to consider evidence of substantial change of condition, that the Commission should have the same authority. The claimant argues that he has been deprived by the hearing officer of the opportunity to present evidence on the matter of substantial change of condition. Claimant also argues that the ombudsman advised him an appeal of the initial hearing officer's decision was futile. The carrier responds that there is no statute authorizing the Commission to reopen a decision that has become final because of substantial change in condition. The carrier argues that even the limited grant of authority to the courts in the 1989 Act with regard to substantial change in condition only allows the court to consider some evidence beyond that presented to the Commission, not to "reopen" the issues. The carrier disputes that there is any evidence that claimant was advised by the ombudsman that an appeal was futile. The carrier concludes by pointing out that claimant was well aware, at the time of the first hearing and before his appeal deadline, of the option for surgery and could have addressed the possibility if substantial change in his condition by seeking to delay that hearing until after the surgery.

DECISION

We affirm the hearing officer's decision.

The claimant had a previous contested case hearing to determine the issues of impairment and MMI for his back injury. The record indicates that this hearing was

originally set for July 6, 1993, but continued to allow the claimant to seek the assistance of the ombudsman. The hearing was thereafter held September 20, 1993. The hearing decision from that hearing noted that claimant's treating doctor, Dr. D, had discussed surgery with claimant but was concerned with the risk. The designated doctor referred claimant to a neurosurgeon, Dr. H, whom claimant had consulted with before his CCH, as early as sometime in July 1993, according to his testimony. The hearing officer noted (in the earlier decision) that Dr. H had not firmly recommended surgery.

A letter from Dr. H, apparently received by the carrier a few days after the September 20, 1992, hearing indicated that he was actively evaluating claimant for surgery. It appears that the hearing officer's decision in the first hearing would have been received sometime during the first week of October 1993, and the time for filing an appeal would have been fifteen days after receipt of that decision. The decision was not appealed.

Log entries from the Commission's dispute resolution information system indicated that on October 4, 1993, the ombudsman attempted to contact the claimant when she received a copy of the hearing officer's decision, and found his telephone was disconnected. The note recorded that the ombudsman sent claimant a letter that day advising him that he had 15 days to appeal the decision and inviting him to contact her if he needed assistance. The next log entry note is dated November 9, 1993, and noted that claimant called the ombudsman to find out about filing an appeal. According to this entry, the claimant told the ombudsman that he was waiting for additional information from his doctors, without which he wouldn't have won the appeal.

At the hearing that is the basis of this appeal, the claimant stated he had surgery in January 1994. He was permitted to submit whatever medical evidence he deemed relevant. He said he had substantially changed, in his personal opinion, because he was worse after his fusion surgery.

The applicable statutes which underlie the hearing officer's decision are Sections 410.169, 410.251, and 410.307. The first section provides that the hearing officer's decision is final in the absence of a timely appeal by a party. Section 410.251 requires exhaustion of the administrative remedies, and a final decision of the Commission's Appeals Panel, to obtain judicial review. Evidence of extent of impairment is limited to that presented to the Commission, Section 410.306(c), unless there is a "substantial change of condition" as set out in Section 410.307:

(a)Evidence of the extent of impairment is not limited to that presented to the Commission if the court, after a hearing, finds that there is a substantial change of condition. The court's finding of a substantial change of condition may be based only on:

(1)medical evidence from the same doctor or doctors whose testimony or opinion was presented to the Commission;

(2)evidence that has come to the party's knowledge since the contested case hearing;

(3)evidence that could not have been discovered earlier with due diligence by the party; and

(4)evidence that would probably produce a different result if it is admitted into evidence at the trial.

(b)If substantial change of condition is disputed, the court shall require the designated doctor in the case to verify the substantial change of condition, if any . . . .

Among other provisions in this statute is 410.307(e), which states provides that the court shall not make its finding of substantial change of condition known to the jury.

It is clear that this statute expressly contemplates and authorizes the actions that a court may take in review of a decision of the Appeals Panel on the basis of substantial change in condition. There is no counterpart statute authorizing the agency to reopen a final, unappealed decision of a hearing officer. The provision of the old act, TEX. REV. CIV. STAT. ANN. Art. 8306 §12d, which granted the Industrial Accident Board some authority to review orders based upon a change of condition, was repealed and no similar provision was enacted as part of the 1989 Act. Administrative agencies are creatures of statute, and may exercise only the authority expressly granted, or necessarily implied from such express grants. Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129 (Tex. App.- Austin 1986, writ ref'd n.r.e.). Claimant cites no authority from which to imply that there was a legislative intent to authorize the Commission to reopen proceedings on the same issues which have become final under Section 410.169. The argument urged by the claimant would allow a "loophole" for both carriers and claimants who do not exercise diligence in appealing decisions to circumvent the finality of those decisions. We note here that this is distinguishable from the situation where there is an ongoing dispute resolution proceeding before the Commission on the issues of impairment and/or MMI. *See* Texas Workers' Compensation Commission Appeal No. 94492, decided June 8, 1994.

The scenario argued by claimant, that the hearing officer's decision would "drive" a party to appeal every decision just in case there might be a future substantial change in condition, is not analogous to the facts of this case. The claimant here, at the time of his earlier hearing, was actively consulting with a neurosurgeon and discussing surgery. A brief letter, timely filed, which questioned the hearing officer's adoption of the designated doctor's opinion as the basis that further surgery was indicated would have been enough to

appeal the decision and preserve error for a future court proceeding. The evidence is devoid of any support for claimant's assertion on appeal that he was misinformed by the ombudsman. Although claimant's argument presupposes that he has a substantial change in condition, reasonable minds could differ as to whether the evidence in this hearing would meet the stringent definition of "substantial change of condition" set forth in Section 410.307(a).

We believe the hearing officer has correctly interpreted the statute. We therefore affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge