

APPEAL NO. 002281

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 6, 2000. The issue at the CCH was whether the claimant's (respondent) request for spinal surgery should be approved. The hearing officer found the evidence insufficient to reach a determination of the appellant's (carrier) liability and returned the matter to the Spinal Surgery, Medical Review Division of the Texas Workers' Compensation Commission (Commission). The carrier appealed on the grounds of sufficiency of the evidence contending that more than enough evidence was taken at the hearing to support a determination in this matter. The claimant responded that the hearing officer's decision and order were correct.

DECISION

Reversed and remanded.

The hearing officer simply recites in her Statement of the Evidence and as her sole finding of fact that there was insufficient evidence in the file and the parties' exhibits to reach a determination of the carrier's liability regarding spinal surgery and gives absolutely no explanation for this result. The record contains documentation of the spinal surgery process, which we do not list again as a complete listing of the documents was provided by the hearing officer in her decision and order, including the results of diagnostic testing, the spinal surgery packet (including the spinal surgery record/log and Commission letters to parties), and the medical reports from Dr. T, the recommending surgeon, Dr. C, a second opinion doctor, and Dr. R, a second opinion doctor.

The carrier on appeal asserted that because the claimant failed to timely select a second opinion doctor, the decision by the Spinal Surgery Section of the Medical Review Division to close the file and notify the parties was proper and binding; that when the claimant thereafter selected Dr. R as her second opinion doctor she did so improperly because she failed to do so pursuant to the amendment or resubmission process required by Commission rule. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206). The carrier further contended that when the claimant had spinal surgery without an order from the Commission ordering that the costs of surgery be borne by the carrier, it should not be ordered retroactively to pay for a procedure that was unauthorized by the Commission prior to the procedure taking place. The carrier noted that the Spinal Surgery Section's second letter that was issued two-to-one in favor of spinal surgery was not issued until after the surgery, some seven months later. This appears to be corroborated by the letters and the activity record log that the Spinal Surgery Section keeps to record its actions in sequential order.

At the hearing the claimant's attorney, after offering various documents, requested that the hearing officer order the Medical Review Division to provide copies of its entire file because the documentation was incomplete and he had not seen the file prior to the date

of the CCH. The claimant did not ask for a continuance or request that the matter be returned to the Medical Review Division, only that it be ordered to produce the documents so he could review them to understand the sequence of events. The carrier contended at the CCH that the documentation was complete and that the hearing officer should make a decision. The hearing officer did not continue the case in order for the claimant to review the documentation but issued a decision and order simply reciting that the evidence was insufficient.

On appeal, the carrier argues that it was the obligation of the hearing officer to decide the issue presented at the CCH and that the 1989 Act does not provide for a remand by the hearing officer to a lower level; that had she issued a decision and order as required, she would have had to find in favor of the carrier. In the present case, the parties proceeded directly to a CCH as required under the provisions of Rules 130.206(k) and 142.5(c), rather than to a benefit review conference (BRC).

Section 410.168(a)(2) of the 1989 Act provides that a hearing officer "shall" issue a written decision which includes a determination of whether benefits are due. In cases where a prerequisite to holding a CCH is a BRC, the Appeals Panel has previously held that a hearing officer has no authority under the 1989 Act to "remand" a case to a BRC after issues have been set forth in a benefit review officer's (BRO) report and the case has been convened for a CCH. Texas Workers' Compensation Commission Appeal No. 990831, decided June 3, 1999. See *also* Texas Workers' Compensation Commission Appeal No. 94416, decided May 24, 1994, in which the Appeals Panel pointed out that there is no statutory authority for a hearing officer to "remand," noting that once a dispute goes to a CCH, the dispute should be resolved at that stage of dispute resolution. The provisions of Section 410.168(a)(2) are no different in a spinal surgery case and, therefore, the hearing officer in this case was required to determine whether benefits are due, specifically, whether the carrier was liable for the costs of spinal surgery.

We reverse the finding of the hearing officer that the dispute was not ripe for determination and remand the case back to the hearing officer to make a decision under the provisions of Rule 133.206. No further hearing is necessary. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

We reverse and remand the decision and order of the hearing officer.

Kathleen C. Decker
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge