APPEAL NO. 010160

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 4, 2001, a contested case hearing (CCH) was held. The hearing officer resolved the disputed issues by deciding that the respondent's (claimant) request for spinal surgery should be approved; that the appellant (carrier) did not file its appeal with the Texas Workers' Compensation Commission (Commission) within 10 days after its receipt of notice from the Commission regarding its liability for spinal surgery; and that Dr. T, the claimant's second opinion doctor, concurred with Dr. M recommendation for spinal surgery. The carrier appealed and the claimant responded.

DECISION

The hearing officer's decision is affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that on that day he injured his low back and neck when he was thrown several feet when a tank exploded. The claimant's treating doctor, Dr. Gu, referred the claimant to Dr. M. In a Recommendation for Spinal Surgery (TWCC-63) dated November 11, 1999, Dr. M recommended the following procedures for the claimant's lumbar spine: (a) "lumbar decompression"; (b) "addtl segment x 2"; (c) "PLIF"; (d) "addtl interspace."

Dr. G, the carrier's second opinion doctor, examined the claimant and, in a report dated December 15, 1999, stated that Dr. M had noted on November 10, 1999, that the claimant requires a "decompression between L3 and S1 with a fusion from L4 through S1." Dr. G did not concur with the surgery request, noting that it was not likely that spinal surgery, as recommended by Dr. M, would benefit the claimant.

Dr. T, the claimant's second opinion doctor, examined the claimant and in a report dated January 26, 2000, recommended that the claimant have a discogram prior to surgery.

In a February 11, 2000, letter regarding the results of the spinal surgery opinion process, the Commission wrote that the carrier was not liable for the costs of spinal surgery at that time.

On February 28, 2000, Dr. R performed a lumbar discogram on the claimant and Dr. M sent that test to Drs. T and G.

Dr. T reviewed the discogram and reported that the claimant should have "diskectomy and fusions at 3-4, 4-5, and 5-1." Dr. T stated that he felt that it is unwise to build a two-level fusion below a bad disc and therefore recommended the three-level

fusion. Dr. T also stated that "I definitely feel that a 3-level decompression and fusion with instrumentation would be indicated and the lumbar spine of L3 to the sacrum."

Dr. G reviewed the discogram and reported that he continues to hold the opinion that the spinal surgery recommended by Dr. M would not likely benefit the claimant.

In a July 17, 2000, letter regarding the result of the spinal surgery second opinion process, which is marked as "amended," the Commission noted that one of the second opinion doctors agreed with the claimant's doctor's recommendation for spinal surgery and that if the carrier does not appeal, they will be liable for the reasonable and necessary costs of spinal surgery related to the compensable injury and for the medically necessary care related to the spinal surgery.

On September 11, 2000, Dr. M performed surgery on the claimant, which included laminectomies and discectomies at L3-4, L4-5, and L5-S1, and posterior interbody fusions at L3-4, L4-5, and L5-S1.

The carrier contends on appeal, as it did at the CCH, that the hearing officer did not have jurisdiction to hear the case because the State Officer of Administrative Hearings had exclusive jurisdiction to conduct the hearing under Section 413.031. We disagree because Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206), regarding the spinal surgery second opinion process, provides in subsection (k)(3) that "the hearings and further appeals shall be conducted in accordance with Chapters 140 - 143 of this title (relating to Dispute Resolution/General Provisions, Benefit Review Conferences, Benefit Contested Case Hearing, and Review by the Appeals Panel)." Thus, the CCH was the proper forum for the carrier's dispute regarding its liability for spinal surgery and the Appeals Panel has so held in another case involving a spinal surgery dispute. *See* Texas Workers' Compensation Commission Appeal No. 961432, decided August 28, 1996.

The carrier contends that Rule 133.206(k) "is invalid to the extent that it conflicts with Labor Code Section 413.031." The Appeals Panel has previously held that it does not have authority to decide the validity of Commission rules. Texas Workers' Compensation Commission Appeal No. 980427, decided April 15, 1998. Texas Workers' Compensation Commission Appeal No. 980673, decided May 18, 1998, noted that administrative rules are presumed to be valid, that the burden of proving invalidity is on the party asserting invalidity, and that the courts are the proper forum for deciding the validity of agency rules.

The carrier also contends on appeal, as it did at the CCH, that the claimant lacked standing to be a party to the CCH because he has no "justifiable interest" in the outcome of the CCH. Rule 140.1 defines "Party to a Proceeding" as "a person entitled to take part in a proceeding because of a direct legal interest in the outcome." We conclude that the hearing officer did not err in determining that the claimant had standing to participate in the spinal surgery CCH.

The hearing officer did not err in determining that the carrier did not file its appeal with the Commission within 10 days after receipt of notice from the Commission regarding the carrier's liability for spinal surgery. Rule 133.206(k)(2) provides that a carrier may appeal to a CCH if there is a second opinion nonconcurrence and Rule 133.206(k)(3) provides in part that the appeal must be filed within 10 days after receipt of notice from the Commission regarding carrier liability for spinal surgery and that the appeal must be filed in compliance with Rule 142.5(c), which is the rule that sets out how a request for a CCH shall be made. Rule 133.206(b)(1)(E) provides that the carrier is liable in the following situation of "no timely appeal after two second opinions, only one of which is a concurrence."

The hearing officer found that the carrier received notice from the Commission regarding the carrier's liability for spinal surgery on July 22, 2000, which is five days after the date of the July 17, 2000, Commission letter stating that the carrier is liable for spinal surgery if it does not appeal. *See* Rule 102.5(d). The hearing officer also found that the carrier requested a CCH on or about September 27, 2000, and determined that the carrier did not file its appeal with the Commission within 10 days after receipt of notice from the Commission regarding the carrier's liability for spinal surgery.

The carrier contended that it disputed the July 17, 2000, notice from the Commission within 10 days and put into evidence a letter from its adjustor dated July 24, 2000, in which the adjustor states that the recent spinal surgery decision is being disputed and requests a spinal surgery CCH on behalf of the carrier. The adjustor wrote a letter to the carrier's attorney in September 2000 stating that on July 24, 2000, she filed a request for a spinal surgery CCH with the Commission by regular mail and that it is her practice to send a copy of such matters to the claimant and his representative.

The copy of the adjustor's letter of July 24, 2000, which the carrier put into evidence, contains no indication that it was received by the Commission. A Commission Dispute Resolution Information System contact data entry, which the hearing officer took official notice of, reflects that the carrier's letter of July 24, 2000, requesting a spinal surgery CCH was hand delivered to the Commission on September 27, 2000. A letter from Dr. M's office reflects that Dr. M was not notified of any dispute regarding the claimant's surgery until after the surgery was performed. The claimant testified that he did not receive any notice of a dispute regarding spinal surgery until after his surgery of September 11, 2000, and an affidavit from the claimant's attorney reflects that no one at her office received any notice of a dispute of the Commission's letter of July 17, 2000, until her office received notice of the setting of a CCH on October 5, 2000.

The conflicting evidence was for the hearing to resolve as the finder of fact. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's determination that the carrier did not timely file its appeal within 10 days is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer did not err in determining that Dr. T's opinion constituted a concurrence to the proposed spinal surgery. The carrier contends that Dr. T's opinion was not a concurrence because Dr. T recommended a three-level fusion and not a two-level fusion as recommended by Dr. M.

Rule 133.206(a)(13) provides the following definition of concurrence:

> (13) Concurrence - A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

In Texas Workers' Compensation Commission Appeal No. 001401, decided July 25, 2000, the Appeals Panel addressed the issue raised by the carrier and stated thusly:

> In order to qualify as a concurrence under Rule 133.206(a)(13), the second opinion doctor must agree on the proposed type of spinal surgery and the region (cervical, thoracic, lumbar, or sacral) of the spine involved. However, the second opinion doctor does not have to agree on the approach (anterior, posterior, instrumentation, cages, etc.) or on the number of levels within the region in which the recommended surgery will be performed.

The carrier also contends that it is not liable for spinal surgery because Dr. M performed a three-level fusion instead of a two-level fusion. We do not find that to be a sufficient basis to relieve the carrier of liability for the spinal surgery under the circumstances of this case.

The hearing officer did not err in determining that the great weight of the other medical evidence is not contrary to the recommendation for spinal surgery by Dr. M and Dr. T, and that the claimant's request for spinal surgery should be approved. The carrier contends that the great weight of the medical evidence is contrary to the need for surgery in this case.

Section 133.206(k)(4) provides that:

> (4) Of the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the

hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

While there is conflicting evidence in this case, the hearing officer's determination is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge