APPEAL NO. 011557
FILED AUGUST 7, 2001

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 May 29, 2001. He determined that the Hearings Division of the Texas Workers' Compensation Commission (Commission) did not have jurisdiction over the controversy. The appellant (claimant) appeals and argues that an advisory of the Commission stated that this procedure would be considered under the spinal surgery rules until April, 12, 2001, and that applies to this case. The respondent (self-insured) responded that the procedure under consideration is not spinal surgery and the decision should be affirmed.

DECISION

We reverse and render the opinion that the self-insured is liable for the cost of the recommended spinal surgical procedure.

The hearing officer erred in finding he had no "jurisdiction" to adjudicate this matter or that the self-insured was not liable for the cost of a spinal procedure that it stipulated was "surgical" and further stipulated was concurred in by two doctors in the second opinion process.

The claimant, an employee of the self-insured, sustained an undisputed lumbar herniation that caused considerable pain. While his treating doctor recommended fusion surgery, the doctor was willing to try the less drastic Intra-Discal Electro Thermal treatment (IDET) procedure because the claimant indicated a preference for a less invasive procedure first. According to an article presented by the self-insured, the IDET procedure costs an average 17% of what an open spinal surgery costs.

The record indicates that the IDET procedure was requested on the Recommendation for Spinal Surgery (TWCC-63) on July 26, 2000. The self-insured requested a second opinion by the deadline, and the claimant was ultimately examined by two second opinion doctors, one of whom agreed with the proposed IDET procedure. The Medical Review Division issued a notice to the self-insured on October 20, 2000, that it was liable for the cost of the procedure. It was not until after this point that the self-insured began to raise the argument that the IDET procedure was not "spinal surgery."

At the CCH, the parties **stipulated** that the "surgical procedure" recommended by the treating doctor was IDET. The hearing officer likewise made a finding of fact based upon this stipulation. The self-insured has not appealed this determination. The parties further stipulated that two doctors concurred in the need for "spinal surgery."

The hearing officer erred in not fully applying Advisory 2001-04 to the facts of this case and not holding that the self-insured was liable for the cost of the IDET surgical procedure.

The IDET procedure is performed on the spine. As the parties stipulated, and the literature in the record supports, it is a "surgical procedure." Neither the 1989 Act nor the rules define "spinal surgery." Dorland's Illustrated Medical Dictionary, 27th edition, defines "surgery" as: "1. That branch of medicine which treats diseases, injuries, and deformities by manual or operative methods. 2. The place in a hospital or doctor's or dentist's office where surgery is performed. 3. In Great Britain, a room or office where the doctor sees and treats patients. 4. The work performed by a surgeon." Plainly, the definition incorporates less invasive procedures than open operations involving the use of general anesthesia, and is broad enough to include procedures that would occur in a doctor's or dentist's office. Our review of the article presented by the self-insured on the IDET procedure shows it to involve introduction of a catheter into the disc under local, versus general, anesthesia, and then administration of heat with the objective of causing physical change in the disc.

Although the self-insured argues that the second opinion doctors describe the IDET as an alternative to surgery, it is in fact described as an alternative to a fusion procedure, not to "surgery" per se. In fact, the claimant's second opinion doctor, referring to the recommended the IDET procedure, noted that "his surgery" had not yet been scheduled. Likewise, the self-insured's choice of doctor does not state that the IDET procedure is not surgery, and he in fact describes it as an "operative intervention," but withholds approval pending further testing of the claimant (a myelogram).

Apparently, at least one determination about liability for the IDET procedure went through the alternative route of the preauthorization process, and resulted in a decision from the State Office of Administrative Hearings (SOAH) on November 6, 2000, that adjudicated the merits of liability for an IDET procedure. While there is an opening recitation in the decision that SOAH "has jurisdiction" of the matter, there is no indication that the hearings examiner was faced with the argument that IDET should have gone through the second opinion process. The heart of the matter adjudicated by SOAH was whether the procedure was reasonable and necessary.

If such procedures were also being considered under the preauthorization process, it would explain the issuance of Advisory 2001-04 by the Executive Director of the Commission on April 11, 2001. The hearing officer quotes one sentence of this advisory as part of his reasoning for refraining from adjudicating the matter before him; however, he significantly omitted the statement that while beginning on April 12, 2001, IDET procedures would not be considered as Spinal Surgery for purposes of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) beginning on April 12, 2001, a carrier would still be liable for those cases already determined or in process under Rule 133.206. That plainly includes this case. It is the Commission which has "jurisdiction" to adjudicate matters relating to workers compensation benefits. The Advisory seeks to clarify a matter that was arguably not clearly within the oversight of either Hearings or Medical Review processes and clarify from that day forth what the situation will be. While it is not the function of the Appeals Panel to pronounce the validity of the rules, policies, and advisories of the Commission, it can be argued that the

aspect of this advisory which should be promulgated through rule-making would be the assessment that IDET is not covered by Rule 133.206, given that it is a surgical procedure undertaken to treat the spine.

Finding an error as a matter of law in the Hearing Officer's determination that he had no jurisdiction, we reverse and, based upon Rule 133.206, Advisory 2001-04, and the stipulated facts of this case, render an order that the self-insured is liable for the costs of the IDET surgery.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

The October 20, 2000, letter from the Medical Review Division shows that the determination on spinal surgery had been made under Rule 133.206 and thus under TWCC Advisory 2001-04, carrier is liable.

Robert W. Potts
Appeals Judge