

APPEAL NO. 020009
FILED FEBRUARY 19, 2002

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 November 27, 2001. With respect to the issue, the hearing officer determined that the appellant (carrier) may not avoid liability for spinal surgery because there is a second concurring opinion for spinal surgery. The carrier appeals, contending that the hearing officer erred in (1) refusing to add an issue for determination at the CCH concerning the extent of the respondent's (claimant) compensable back injury; (2) refusing to admit some of the carrier's exhibits into evidence; and (3) finding that the carrier may not avoid liability for the spinal surgery. The claimant responds, urging affirmance.

DECISION

Affirmed.

LIABILITY FOR SPINAL SURGERY

There is sufficient evidence to support the hearing officer's determination that the carrier is liable for the recommended spinal surgery. The claimant's second opinion doctor concurred with the surgeon's recommendation for spinal surgery, and the carrier's second opinion doctor did not. In accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k)(4) (Rule 133.206(k)(4)), the hearing officer gave presumptive weight to the two opinions which had the same result and determined that the carrier is liable for spinal surgery. The report of the claimant's second opinion doctor is a concurrence under Rule 133.206(a)(13).

REFUSAL TO ADD AN ISSUE

The hearing officer did not err in refusing to add the issue requested by the carrier. By letter dated October 17, 2001, the carrier's representative requested a CCH, to contest spinal surgery; there is no reference to any other issue. Rule 142.7(f) sets forth the requirement for determining disputes without the benefit of a prior benefit review conference and provides that the statement of disputes¹ includes the request for hearing, as described in Rule 142.5(c) and the other party's response. Rule 142.5(c) provides that the request shall identify and describe the disputed issue or issues. We note that the request for the CCH was made on October 17, 2001, and the only issue concerned whether the claimant was entitled to spinal surgery. The hearing officer correctly declined to add the issue requested by the carrier. We find no error.

¹ Rule 142.7(a) provides as follows, "The statement of disputes is a written description of the benefit dispute or disputes to be considered by the hearing officer. A dispute not expressly included in the statement of disputes will not be considered by the hearing officer."

EXCLUSION OF EVIDENCE

Rule 133.206(k)(4) provides: “The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.” The carrier has not shown reversible error in the hearing officer’s ruling excluding from evidence Carrier’s Exhibit Nos. 1 through 10. We note that Carrier’s Exhibit No. 10 is a peer review report wherein it states, “The opinion rendered in this case are the opinions of this evaluator.” Because this “opinion” is not from the surgeon or one of the two second opinion doctors, it was properly excluded. Although the hearing officer may have improperly excluded exhibits 1 through 9 based on Rule 133.206(k)(4), any error was harmless error since the documents were not relevant to determination of the issue properly before the hearing officer.

The hearing officer’s decision and order are affirmed.

The true corporate name of the insurance carrier is **TRANSPORTATION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Michael B. McShane
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge