APPEAL NO. 021606
FILED AUGUST 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 May 22, 2002. The hearing officer determined that he had no authority to order the Medical Review Division of the Texas Workers' Compensation Commission (Commission) to provide the appellant (self-insured) with an additional list of second opinion doctors, or to set aside the Commission determination that the self-insured became liable for the costs of the claimant's (respondent) spinal surgery by operation of waiver. The hearing officer's decision states: "The matter is returned to the commission for such other relief and determinations as the commission deems appropriate." On appeal, the self-insured argues that it did not waive its right to obtain a second opinion on the issue of the need for the claimant's proposed spinal surgery. The appeal file contains no response from the claimant.

DECISION

Reversed and rendered.

The evidence reflects that on November 12, 2001, Dr. F recommended spinal surgery for the claimant. On December 4, 2001, the Commission submitted a copy of this recommendation to the self-insured, instructing that it must notify the Commission of its intent to obtain a second opinion no later than December 18, 2001, or it would waive its right to do so. The notification from the Commission included a list of doctors from which the self-insured could choose. At the CCH, the self-insured contended that on December 18, 2001, it contacted the Commission to request a second list of doctors because none of the doctors on the list provided were able to schedule an appointment for the claimant within the time required. The self-insured argued that the Commission refused to provide a second list, due to the fact that it was requested on the deadline. The self-insured did not, however, provide any documentary evidence to support its contention that it contacted the Commission on December 18, 2001. Commission records indicate no activity or contact on the part of the self-insured after the recommendation for surgery was submitted on December 4, 2001. On February 4, 2002, the Commission issued a letter notifying the parties that the self-insured is liable for the reasonable and necessary costs of the claimant's spinal surgery related to the compensable injury because it failed to respond and/or schedule a second-opinion appointment within the required time frame.

The issue presented to the hearing officer for resolution in this case was worded as follows:

> A [CCH] will be held on the unresolved issue of the need for spinal surgery.

This issue is drafted very broadly, but it is clear from the record that the precise issue litigated by the self-insured, and intended for the hearing officer's resolution, was whether the Commission erred in its initial determination that the self-insured is liable for the costs of spinal surgery because it waived the second-opinion process. At the CCH, the self-insured urged that by contacting the Commission on December 18, 2001, to request a second list of doctors, it had not waived the second-opinion process. The hearing officer determined that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(k) (Rule 133.206(k)), he had no authority to set aside the Commission determination that the self-insured is liable for the costs of spinal surgery, or to direct the Medical Review Division to provide a second list of second-opinion doctors. The self-insured argues on appeal that it did not trigger any of the waiver provisions provided for in Rule 133.206(g)(3) and, therefore, is not liable for the costs of spinal surgery.

Unfortunately, the hearing officer's reliance on Rule 133.206(k) and the self-insured's reliance on Rule 133.206(g)(3) are misplaced. Rule 133.206(k) governs appeals to a CCH where a second opinion has been provided. In the present case, a second opinion was not rendered and, as such, Rule 133.206(k) is inapplicable. In its appeal, the self-insured relies on the provisions of Rule 133.206(g)(3) in support of its position that it did not waive a second opinion. However, this subsection governs cases where a carrier scheduled a second-opinion examination but did not do so within the proper time or with an approved doctor, or did not give proper notification of the appointment. Accordingly, this subsection is inapplicable to the facts in the present case.

The appropriate waiver provision applicable to this case is Rule 133.206(g)(1), which provides:

> (g) Carrier Waiver of or Request for Second Opinion by Carrier-Selected Doctor; Carrier Records.
>
> (1) The carrier must waive the second opinion or request a second opinion exam be performed by a carrier-selected doctor. This decision and choice of the carrier-selected doctor from a sublist must be made and submitted to the division on a TWCC-63 in the form and manner prescribed by the division and without undue delay but no later than 14 days after the acknowledgment date. The TWCC-63 may be faxed or delivered directly to the division.

The preamble to the rule explains that one of its goals is to decrease processing time in order to achieve speedier resolution of the spinal surgery process. While Rule 133.206(g)(1) requires the carrier to act within 14 days, Rule 133.206(h)(7) imposes a reciprocal obligation on the claimant in cases where a second opinion was obtained and resulted in a nonconcurrence of the proposed surgery. Neither provision provides for exceptions or excuses for not complying with the 14-day requirement, nor do they contain provisions for tolling the deadline by requesting a second list of doctors. There

is no evidence in the record indicating that, on or before December 18, 2001, the self-insured notified the Commission of its intent to obtain a second opinion, or provided the information required by Rule 133.206(g)(1). Consequently, the self-insured's inaction constituted a waiver and it is liable for the reasonable and necessary costs of the claimant's spinal surgery. Section 408.026(a)(2). *See also*, Texas Workers' Compensation Commission Appeal No. 020413, decided April 15, 2002.

Accordingly, we reverse the hearing officer's decision, which did not resolve the spinal surgery dispute, and render a new decision that the Commission did not err in its initial determination that the self-insured is liable for the reasonable and necessary costs of spinal surgery because it waived the second-opinion process.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

AR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Robert W. Potts
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

CONCUR IN RESULT:

_____
Robert E. Lang
Appeals Panel
Manager/Judge