

APPEAL NO. 023120
FILED JANUARY 23, 2003

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 29, 2002. In his first decision and order, the hearing officer determined that he lacked authority to set aside the Texas Workers' Compensation Commission (Commission) determination that the appellant (carrier) became liable for the costs of the respondent's (claimant) spinal surgery by operation of waiver. The carrier filed an appeal and contended that the hearing officer failed to decide the issue presented to him for resolution and that a new decision should be rendered finding that the carrier is not liable for the costs of the claimant's spinal surgery. The file did not contain a response from claimant to that first appeal. The Appeals Panel reversed the hearing officer's decision and order and remanded that case to the hearing officer for findings of fact and conclusions of law regarding whether carrier was liable for spinal surgery. Texas Workers' Compensation Commission Appeal No. 022158, decided October 15, 2002. The hearing officer scheduled a hearing on remand, but neither party attended. On remand, the hearing officer determined that carrier waived a second opinion and that it is liable for the spinal surgery. Carrier again appeals, contending that it "attempted to get a doctor to set an appointment within the recommended timeframe," pointing out that it requested an amended sublist of doctors. Claimant responded that the Appeals Panel should affirm the hearing officer's determination.

DECISION

We affirm.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(g)(3) (Rule 133.206(g)(3)) states, in relevant part, that a carrier will be deemed to have waived a second opinion "if the carrier . . . sets an appointment which exceeds 30 days from the acknowledgment date" Rule 133.206(a)(5) states that the acknowledgment date is the earlier of the date on which the insurance carrier's representative in signs for the Recommendation for Spinal Surgery TWCC-63 form or narrative report, or the day after the date the TWCC-63 form or narrative report is placed in the carrier's box.

Carrier contends that the hearing officer erred in determining that it is liable for spinal surgery. It asserts that: (1) it repeatedly requested an amended sublist of doctors from the Commission; (2) there was a delay in sending out the amended sublist; (3) because of the delay, carrier took the first available appointment with Dr. H; and (4) carrier attempted to get a doctor to set an appointment within the recommended timeframe.

The procedural facts are not in dispute. The hearing officer made the following unappealed findings: (1) on December 21, 2001, Dr. G, filed a TWCC-63 with the

Commission recommending both cervical and lumbar surgery;¹ (2) on January 9, 2002, a sublist of second-opinion doctors was generated and delivered to the carrier's representative's box on January 10, 2002; (3) the TWCC-63 stated that carrier's due date is January 24, 2002; and (4) on December 27, 2001, the Commission stamped as received a TWCC-63 from Dr. G, generated the same sublist on January 16, 2002, and forwarded a copy of the TWCC-63 to carrier with a listed due date of January 31, 2002; (5) the acknowledgment date for the TWCC-63 date stamped received on December 21, 2001, was January 10, 2002, and the acknowledgment date for the TWCC-63 date stamped received on December 27, 2001, was January 16, 2002; and (6) on January 24, 2002, carrier filed its copy of the TWCC-63 with the Commission indicating that it had scheduled an appointment with Dr. H for March 6, 2002.²

We note that at the first hearing, carrier did not state that it attempted to get another doctor on the sublist to set an appointment within the 30-day period. Carrier did state that the appointment set was the "first available" appointment with Dr. H, but did not offer evidence regarding its efforts to contact other doctors on the sublist. A February 19, 2002, letter from carrier's attorney indicates that the appointment with Dr. H was not scheduled until after attempts had been made to obtain an amended sublist from the Commission. The hearing officer could and did find from the evidence that carrier set an appointment which exceeded 30 days from the acknowledgment date in this case. After considering the record and Rule 133.206, we conclude that the hearing officer did not err in his determination that carrier waived a second opinion in this case and that it is liable for spinal surgery.

¹ Rule 134.600 does not apply because the TWCC-63 was filed before its effective date.

² There are several clerical errors in the decision and order where the year 2001 is used in dates where clearly the hearing officer meant to write 2002.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Reliance National Indemnity Company**, an **impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
T.P.C.I.G.A.
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge