APPEAL NO. 040000-s
FILED FEBRUARY 25, 2004

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 December 3, 2003. The hearing officer resolved the disputed issue by deciding that the Independent Review Organization's (IRO) decision is not supported by a preponderance of the evidence. The appellant (self-insured) appeals, contending that the hearing officer erred in denying its motion to dismiss and in determining that the IRO's decision is not supported by a preponderance of the evidence. The respondent (claimant) asserts that the hearing officer was correct in denying the self-insured's motion to dismiss and in determining that the IRO's decision is not supported by a preponderance of the evidence.

DECISION

Affirmed.

MOTION TO DISMISS

We do not agree with the self-insured's contention that the hearing officer erred in denying its motion to dismiss. The self-insured filed a motion for continuance/motion to dismiss, which the hearing officer denied. The self-insured does not assert error in the denial of the motion for continuance. It asserts that the hearing officer erred in denying its motion to dismiss. Initially we note that, in its appeal, the self-insured incorrectly refers to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(u) (Rule 133.308(u)) as the pertinent rule provision regarding spinal surgery appeals. As adopted effective January 2, 2002, Rule 133.308(u) was the subsection dealing with spinal surgery appeals; however, Rule 133.308 was amended effective January 1, 2003, and as amended the subsection regarding spinal surgery appeals was changed to subsection (v). The self-insured's motion to dismiss correctly references Rule 133.308(v).

Rule 133.308(v) provides as follows:

(v) Spinal Surgery Appeal. A party to a prospective necessity dispute regarding spinal surgery may appeal the IRO decision by requesting a [CCH].

(1) The written appeal must be filed with the Commission Chief Clerk of Proceedings, Division of Hearings, within 10 days after receipt of the IRO decision and must be filed in compliance with § 142.5(c) of this title (relating to Sequence of Proceeding to Resolve Benefit Disputes).

(2) The CCH will be scheduled and held within 20 days of Commission receipt of the request for a CCH.

(3) The hearing and further appeals shall be conducted in accordance with Chapters 140, 142, and 143 of this title (relating to Dispute Resolution/General Provisions, Benefit [CCH], and Review by Appeals Panel).

(4) The party appealing the IRO decision shall deliver a copy of its written request for a hearing to all parties involved in the dispute; the IRO is not required to participate in the CCH or any appeal.

On appeal, the self-insured argues two of the grounds set forth in its motion to dismiss. First, the self-insured asserts that prior to the commencement of the CCH, it had no evidence that the claimant had filed an appeal within 10 days after receipt of the IRO decision. The IRO decision, which upheld the self-insured's denial of the requested services, is dated November 7, 2003, and reflects that a copy was sent to the self-insured and the claimant on that date. The claimant said that he received the IRO decision on November 10, 2003. The claimant's written request for a CCH on the IRO's decision is dated November 10, 2003, and is date stamped as having been received by the Commission's Chief Clerk of Proceedings on November 13, 2003. The claimant's appeal of the IRO decision was timely under Rule 133.308(v). By letter dated November 18, 2003, the Commission notified the claimant and the self-insured that a CCH would be held on the claimant's appeal of the IRO decision on December 3, 2003. It is clear that the self-insured did have notice that the claimant had appealed the IRO decision prior to the CCH and it is clear that the claimant timely appealed the IRO decision.

The self-insured also argues that the claimant's failure to deliver a copy of his written request for a CCH to all other parties involved in the dispute, namely the self-insured, resulted in the claimant's failure to invoke the jurisdiction of the Division of Hearings to hear the case or that it results in a waiver on the part of the claimant to appeal the IRO decision. We disagree with the self-insured's contention regarding lack of jurisdiction and waiver on the claimant's part.

The claimant is, and has been, unrepresented in this dispute. He was assisted by an ombudsman at the CCH. Rule 142.5(c), which is referenced in Rule 133.308(v)(1), provides as follows:

(c) Requesting a hearing. A party may request the Commission to set a benefit [CCH]. The request shall be made in the following manner:

(1) If the party is represented, the request shall:

(A) be made in writing and signed by the requestor;

(B) identify and describe the disputed issue or issues:
(C) state the reason for requesting the hearing;
(D) be sent to the Commission; and
(E) be delivered to all the other parties, as provided by §142.4 of this chapter (relating to Delivery of Copies to All Parties).

(2) An unrepresented claimant may request a hearing by contacting the Commission in any manner.

The claimant testified that he did not deliver a copy of his written request for a CCH to the self-insured. He said that when he received the IRO decision on November 10, 2003, he went that day in person to the adjuster that was handling his claim for the self-insured and told the adjuster that he was going to appeal the IRO decision, but that he did not give the adjuster a copy of the written request for a CCH he filed with the Commission. The adjuster testified that she met with the claimant on November 10, 2003; that she made a copy of the IRO decision that the claimant showed to her and later that day received a copy of the IRO decision in the mail; that the claimant made it clear to her that he did not agree with the IRO decision and that he intended to sue the self-insured; and that she was not certain if the claimant told her that he was going to appeal the IRO decision. It is clear from the claimant's testimony that he did not deliver a copy of his written request for a CCH to the self-insured or the self-insured's adjuster. The question before us is whether the claimant's failure to deliver a copy of his request for a CCH to all other parties involved in the dispute, as provided for in Rule 133.308(v)(4), results in the claimant's failure to invoke the jurisdiction of the hearings division or in waiver on his part to appeal the IRO decision as contended by the self-insured. We think not.

While Rule 133.308(v)(4) provides that the party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute, Rule 133.308(v)(1) provides that the written appeal must be filed in compliance with Rule 142.5(c). Rule 142.5(c) is a specific provision on requesting a hearing and it distinguishes a party who is represented from an unrepresented claimant, such as the claimant in this case. Rule 142.5(c)(1) sets forth the requirements for a represented party to request a CCH and specifically provides in subparagraph (E) that the request for a CCH shall be delivered to all other parties as provided by Rule 142.4 (relating to Delivery of Copies to All Parties). Rule 142.5(c)(2), relating to a request for a CCH from an unrepresented claimant, does not contain any provision regarding delivery of the request to all other parties. Since Rule 133.308(v)(1) specifically provides that the written appeal must be filed in compliance with Rule 142.5(c), we must read Rule 133.308(v)(4) in conjunction with Rule 142.5(c), and since Rule 142.5(c)(2) does not contain a provision requiring an unrepresented claimant, such as the claimant in this case, to deliver a copy of the request for a CCH to all other parties, as represented parties are required to do under Rule 142.5(c)(1)(E), we cannot conclude that the hearing officer lacked jurisdiction to hear the claimant's appeal of the IRO decision or that the claimant waived his right to appeal the IRO decision as contended by the self-

insured. Consequently, we do not find that the hearing officer erred in denying the self-insured's motion to dismiss. We also note that within five days of the date the claimant's request for a CCH on the IRO decision was date stamped as filed with the Commission, the Commission by letter dated November 18, 2003, notified the self-insured that a CCH had been set on the claimant's appeal of the IRO's decision. We do not find the two court cases or the Appeals Panel decision cited by the self-insured in its appeal to be controlling in this case as those cases and that decision do not address the requirements of Rules 133.308(v) and 142.5(c). To avoid further disputes regarding notice in spinal surgery appeals, we strongly encourage all parties, including unrepresented claimants, to file a written appeal and to deliver a copy of it to all other parties involved in the dispute.

IRO DECISION

The issue at the CCH was whether the IRO's decision is supported by a preponderance of the evidence. Rule 133.308(w) (formerly Rule 133.308(v)) provides that in all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight. In Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002, the Appeals Panel held that the presumptive weight provision in Rule 133.308(v) (now Rule 133.308(w)) is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption; that the IRO decision is the decision which should be adopted, unless rebutted by contrary evidence; and that the hearing officer in that case did not err in applying a preponderance of the evidence standard in determining that the IRO decision was not supported by the evidence. The Appeals Panel has held that whether an IRO decision is supported by a preponderance of the evidence involves a fact issue for the hearing officer to resolve as the sole judge of the weight and credibility of the evidence. Texas Workers' Compensation Commission Appeal No. 032359, decided October 21, 2003.

In 1998 the claimant had surgery at L5-S1. After his 2002 compensable injury, the claimant had one surgery at L3-4 and another at L4-5. According to medical reports in evidence, it appears that the claimant's current treating doctor wants to perform another surgery at L4-5 with the use of an artificial disc (a ProDisc) in order to avoid a three-level fusion. The claimant said that his treating doctor has told him that he will get the artificial disc because "randomization," that is two out of three chances of getting the artificial disc, has been waived. The carrier's two peer review doctors considered the artificial disc to be an experimental procedure that is not broadly accepted as the prevailing standard of care for the injury. The IRO decision upheld the carrier's denial of the surgery for the reason that, although the artificial disc replacement may appear to be an alternative treatment for the claimant's condition, the procedure is without proven efficacy. The claimant's treating doctor wrote that the artificial disc has at least 14 to 16 years of proven efficacy and safety, and that the (institute), with which the treating doctor is affiliated, had just finished a two-year assessment of artificial disc replacement for single-level fusion and found that its efficacy is the same as a spinal fusion. The treating doctor noted that the artificial disc has been used extensively in Europe for 14

to 16 years and that the results, as applied to one and two levels, had been very good. The hearing officer found that the treating doctor had refuted the rationale of the IRO decision as well as the conclusions of the carrier's peer review doctors, and that the treating doctor's reasoning was persuasive in proving that the decision of the IRO is not supported by a preponderance of the evidence. As previously noted, the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

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

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge