

APPEAL NO. 042573-s
FILED DECEMBER 6, 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 was held on September 17, 2004. With regard to the disputed issues before him, the hearing officer determined that the Independent Review Organization (IRO) decision is supported by a preponderance of the evidence and that the respondent (claimant) did not waive his right to medical dispute resolution and independent review of spinal surgery by not timely filing a request as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(e)(2) (Rule 133.308(e)(2)).

The appellant (carrier) appealed asserting that a Request for Independent Review (RIR) by the claimant's treating doctor had been dismissed as untimely and a subsequent RIR by the claimant himself was also untimely. The carrier also asserted that the IRO should never have been appointed in the first place and therefore, no weight should have been given to the IRO determination. The file does not have a response from the claimant.

DECISION

Reversed and rendered.

It is undisputed that the claimant sustained a compensable spinal injury on _____, that Dr. G was the claimant's treating doctor and surgeon and that the claimant had almost two years of failed conservative treatment which included epidural steroid injections, nerve block injections, and physical therapy.

THE WAIVER ISSUE

Dr. G sought preauthorization for an anterior/posterior L5-S1 fusion which was denied by the carrier on February 23, 2004. Dr. G then sought reconsideration which was again denied by the carrier on March 1, 2004.

Rule 133.308 pertains to "Medical Dispute Resolution by [IRO]." Specifically Rule 133.308(e) provides that a person or entity who fails to timely file a request waives the right to independent review or medical dispute resolution. Timeliness is determined in Rule 133.308(e)(2) as:

- (2) A request for prospective necessity dispute resolution shall be considered timely if it is filed with the division no later than the 45th day after the date the carrier denied approval of the party's request for reconsideration of denial of health care that requires preauthorization or concurrent review pursuant to the provisions of § 134.600.

Pursuant to Rule 133.308(e)(2) a request for a prospective necessity dispute resolution for the proposed spinal surgery would have to have been filed with the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD) by April 15, 2004. Dr. G filed a Request for Medical Dispute Resolution (TWCC-60) with the MRD on June 14, 2004. By letter dated June 21, 2004, the MRD dismissed Dr. G's request for RIR because it had not been timely filed pursuant to Rule 133.308(e)(2). The dismissal notice advised that either party had a right to request a hearing within 20 days of receipt of the dismissal. No hearing was requested.

Subsequently, the claimant filed another TWCC-60 requesting RIR of the proposed spinal fusion at L5-S1. A date stamp on the upper right portion of the form is illegible. Above the illegible date stamp someone has hand written "7.6.04." The hearing officer, in his "Background Information" commented that the "[C]arrier has asserted that the date [on the TWCC-60 form] was July 6, 2004." The carrier on appeal disputes that statement and our review indicates that the carrier's attorney stated that he did not know what the date of filing was and speculated that the date in the upper right corner might have been put there by someone at the Commission. In the lower corner of the TWCC-60 form in the block for "Date Stamp for Receipt from Requestor" is an illegible date which could arguably be "JUL 07 2004." The carrier responded to the claimant's TWCC-60 request that the request was untimely pursuant to Rule 133.308(e)(2) by letter dated July 14, 2004. The MRD nonetheless advised the parties by letter dated July 30, 2004, that it was assigning an IRO. The IRO report is dated August 17, 2004.

The hearing officer, in determining that the claimant had not waived his right to independent review of the proposed spinal surgery cited Texas Workers' Compensation Commission Appeal No. 030583, decided April 28, 2003. Appeal No. 030583, was a case where the claimant failed to request reconsideration after the carrier's first denial of prospective surgery and subsequently an IRO was appointed without objection. The Appeals Panel in that case stated that "the hearing officer opines that the carrier also failed to introduce evidence of its compliance which the rule, i.e. its response or objection to the claimant's RIR" and held that "because the IRO proceeded with an evaluation and opinion, the carrier failed to preserve its objection to the claimant's RIR." That case is distinguishable from the instant case, where Dr. G did ask for reconsideration, which was denied, but then failed to timely request a RIR and when he did request the RIR it was dismissed as untimely. In the instant case, the claimant then also requested an RIR for the same procedure for which Dr. G had requested review. If Dr. G's RIR on June 14, 2004, was untimely pursuant to Rule 133.308(e)(2) it would appear that the claimant's subsequent RIR on the TWCC-60 for the same procedure, would also be untimely. We so hold.

Under those circumstances it is immaterial whether the carrier timely objected to the claimant's July TWCC-60. The hearing officer determined that "[T]here was no proof of the date Claimant filed his [RIR]," which under the circumstances is correct (the claimant testified that he did not know or remember when he filed the TWCC-60). That

being so, the hearing officer erred in placing the burden of proof on the carrier by finding that “[T]here was no proof that the Carrier filed its response to Claimant’s [RIR]. . . within seven calendar days of the date of receipt of Claimant’s [RIR]” which by the hearing officer’s prior finding was unknown. The hearing officer’s reliance on Appeal No. 030583, *supra*, is misplaced. The claimant’s RIR, as well as Dr. G’s RIR, was untimely filed, the MRD should have dismissed the claimant’s RIR, as it had Dr. G’s, as being untimely pursuant to Rule 133.308(e)(2) and the IRO should not have been appointed.

THE IRO DECISION

Had the IRO been properly appointed, there was conflicting medical evidence regarding the necessity of the proposed spinal surgery. The IRO’s decision would have been supported by sufficient evidence.

The hearing officer’s determination that the claimant did not waive the right to medical dispute resolution and independent review of spinal surgery is reversed and we render a new decision, that under the circumstances of this case, the claimant had waived the right to medical dispute resolution for the proposed L5-S1 fusion because neither Dr. G, nor the claimant, had timely filed their RIR within 45 days after the date the carrier denied approval of the reconsideration.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 78201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge