APPEAL NO. 950182

On December 13, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the hearing was "what is the claimant's (respondent's) impairment rating [IR]?" The appellant (carrier) disagrees with the hearing officer's decision that the claimant has an 18% IR. The claimant requests affirmance.

DECISION

Reversed and remanded.

According to the benefit review conference (BRC) report, which was the only hearing officer exhibit, the issue raised but not resolved after the BRC was, "what is the [IR]?" The parties agreed at the hearing that the issue in the case is, "what is the claimant's [IR]?" The parties did not present testimony or documentary evidence. According to the transcript of the hearing the parties stipulated that the claimant had back surgery on February 14, 1992, and that the claimant reached maximum medical improvement (MMI) on June 17, 1994. The parties also stated that they "stipulated" to the following matters which are quoted from the record:

Whether - - seven, whether claimant's back injury [sic] was reasonable and necessary medical care or emergency medical care is a matter currently being disputed by the parties and is set for an Administrative Procedure Act [APA] hearing in (city) on December 15, 1994?

Eight, if the surgery had not been done, claimant's [IR] would be eight percent under the AMA Guides?

Nine, with the surgery claimant's [IR] is 18 percent under the AMA Guides.

Ten, the issue is even if claimant's back injury [sic] was not reasonable and necessary medical care or emergency medical care or both, is claimant's [IR] 18 percent for entitlement to workers' compensation benefits? Stated another way, is the carrier required to pay an additional ten percent to reach the 18 percent [IR] even if the surgery was not reasonable and necessary medical care or emergency medical care or both for treatment of the compensable injury?

The hearing officer states in his decision that the parties also stipulated that the claimant sustained a compensable injury on (date of injury); that (Dr. H) is the designated doctor appointed by the Texas Workers' Compensation Commission (Commission); and that Dr. H determined that the claimant's IR would have been eight percent if surgery had

not been performed and is 18% post surgery; however, those stipulations do not appear in the hearing record.

The carrier argued at the hearing that "if the compensable injury did not necessitate the surgery and the surgery causes additional impairment, the carrier is not obligated to pay that additional impairment under the Texas Workers' Compensation Act." The carrier stated "we are more here seeking an advisory opinion." The carrier also stated "but the question is, hypothetically, if the surgery is unnecessary and not related to the original compensable injury, does the carrier bear the burden to pay that additional impairment benefit even when the act specifically says that you are only required to pay impairment benefits based on a compensable injury alone." The claimant argued that "the doctor may have made a decision that - - on his treatment that was not medically, I guess, maybe necessary in his case" but contended that he should still be entitled to impairment income benefits based on an 18% IR "based on the presumptive weight of the designated doctor."

The hearing officer made the following conclusions of law which the carrier disputes:

CONCLUSIONS OF LAW

2. Even if claimant's surgery was not reasonable and necessary medical care or emergency medical care or both, carrier would not be authorized under the Act to reduce claimant's [IR] and income benefits.

3. Claimant's [IR] is 18%.

In its appeal the carrier sets forth many matters that were not in evidence. For example, it asserts that [Dr. HI] recommended back surgery, that it requested a second opinion from [Dr. C], that the Commission approved the request for a second opinion, that the claimant refused to be examined by Dr. C, and that Dr. HI performed the back surgery without benefit of a second opinion and without Commission approval. The carrier also states in its appeal that "[t]he Commission has determined that [Dr. HI's] surgery was not reasonable and necessary, and was not necessitated by an emergency. The Commission's decision is currently under appeal." The carrier further states that "[f]or the purposes of this appeal, the parties stipulate that [Dr. HI's] surgery was unreasonable and unnecessary, and not performed in the face of a medical emergency." The carrier states that its appeal "involves a single point of error," as follows:

Based on the parties' stipulation that the surgery performed by [Dr. HI] was unreasonable and unnecessary, and was not performed in the face of a medical emergency, is [carrier] liable for [claimant's] whole body impairment that resulted solely from the surgery.

The carrier requests that we reverse the decision of the hearing officer and determine that it "is not liable for impairment resulting from the unreasonable and unnecessary back surgery performed by [Dr. HI]."

The claimant states in his response that he objects to the "misguided assumption that the `parties' are in agreement that [Dr. HI's] surgery was unreasonable and unnecessary or that it was not done in the face of an emergency." He states that it is his contention that "the surgery was an emergency and necessary." Claimant further states that "[t]he question whether [claimant's] February 13, 1992, surgery was a medical emergency and necessary, is currently on appeal." The claimant states that the "Issue For Review" is, "[i]f claimant's back surgery was not reasonable and necessary or a medical emergency, is the Respondent entitled to 18% impairment as indicated by the designated doctor." The claimant requests that we affirm the hearing officer's decision.

As previously noted, the parties agreed that the issue at the hearing was "what is the claimant's [IR]?" This is the issue that was reported out of the BRC. As we view the positions of the parties, we are being asked to render an advisory opinion on what the claimant's IR is assuming that his surgery was not reasonable and necessary. There is no stipulation by the parties that the surgery was not reasonable and necessary nor is there any proof in the record that the Commission has made a determination that the surgery was not reasonable and necessary. All the parties stipulated to in Stipulation number seven was that the questions of reasonable and necessary medical care and emergency medical care were matters currently being disputed by the parties and "is set for an [APA] hearing in (city) on December 15, 1994." Stipulation number ten is not a stipulation of fact. Rather, it asks for an advisory opinion on the claimant's IR "if the surgery was not reasonable and necessary."

Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.305(a) (Rule 133.305(a)), a request for medical dispute resolution is to be submitted to the Commission's medical review division, and according to Rule 133.305(m), if the medical dispute remains unresolved after review, the parties may proceed to a hearing "as described in the Act, § 8.26(d)." Article 8308-8.26(d) has been codified as Section 413.031(d) of the Texas Labor Code and that section provides as follows:

> A party to a medical dispute that remains unresolved after a review of the medical service under this section is entitled to a hearing. The hearing shall be conducted in the manner provided for a contested case under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) [effective September 1, 1993, the APA is codified in Chapter 2001 of the Texas Government Code].

In Texas Workers' Compensation Commission Appeal No. 92169, decided June 17, 1992, we stated "[t]here are no provisions for advisory opinions within Articles

8308-6.01 through 6.63 of the 1989 Act [now Sections 410.001 - 410.256; Section 410.203 provides for the powers and duties of the Appeals Panel]." *See also* Texas Workers' Compensation Commission Appeal No. 941523, decided December 22, 1994. Considering that we do not issue advisory opinions, that the parties did not stipulate that the surgery was not reasonable and necessary, and that the parties developed no evidence at the hearing in regard to Commission action on that matter, we reverse the decision of the hearing officer and remand the case to the hearing officer for further consideration and development of the evidence. The evidence should include, but not necessarily be limited to, Commission action on whether the surgery was reasonable and necessary and/or was emergency medical care, and the report of the designated doctor.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Phillip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge