APPEAL NO. 041991-s
FILED OCTOBER 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 (CCH) was held on July 19, 2004. The hearing officer determined that the Independent Review Organization (IRO) decision is not supported by a preponderance of the evidence; that the respondent's (claimant) proposed spinal surgery is reasonable and necessary medical treatment for the compensable injury; and that the Texas Workers' Compensation Commission (Commission) has jurisdiction to adjudicate the claimant's appeal of the IRO decision.

The appellant (self-insured) appeals, contending that the Commission did not have jurisdiction to decide the issues because the claimant had not filed her appeal of the IRO decision in writing and delivered to the opposing party contrary to Commission rules, and that the claimant's proposed spinal surgery was not medically necessary. The day after the self-insured's appeal of the hearing officer's decision and order was filed (but also timely as an appeal and referred to as attachment A), the self-insured filed a report from Dr. W, a designated doctor appointed to assess maximum medical improvement (MMI) and impairment rating (IR). The claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

THE JURISDICTIONAL ISSUE

The self-insured, at the CCH and on appeal, asserts that the claimant did not appeal an IRO decision, which upheld the self-insured's denial of the requested spinal surgery in writing within 10 days after receipt of the IRO decision. The IRO decision, dated June 24, 2004, was sent to the claimant that date and received by the claimant on July 3, 2004. It is undisputed that the claimant called the Commission field office on July 6, 2004, stating that she wanted to appeal the IRO decision and specifically asked if she needed to do so in writing. The field office customer service representative informed the claimant that her dispute had been entered into the Commission computer system and the appeal did not need to be in writing. The matter was subsequently set for a CCH.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(v) (Rule 133.308(v)) provides:

> (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 Proceedings to Resolve Benefit Disputes).

* * * *

(4) 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; the IRO is not required to participate in the CCH or any appeal.

The self-insured contends that Rule 133.308(v) requires a written appeal be filed with the Commission's Chief Clerk of Proceedings, Division of Hearings within 10 days after receipt of the IRO decision and must be filed in compliance with Rule 142.5(c) and that failure to do so fails to invoke the jurisdiction of the Commission.

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

(c) Requesting a hearing. A party may request the Commission to set a benefit contested case hearing. 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 self-insured asserts that the failure of the claimant to appeal in writing to the Chief Clerk of Proceedings as provided for in Rule 133.308(v)(1) results in the claimant's failure to involve the jurisdiction of the Commission.

We addressed a similar contention in Texas Workers' Compensation Commission Appeal No. 040000-s, decided February 25, 2004 (where an injured worker failed to deliver the request to the opposing party), and held that 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. Rule 142.5(c)(2) states that an unrepresented claimant may request a hearing by contacting the Commission in any manner and does not contain any provision that the appeal be in writing. We cannot conclude that the hearing officer lacked jurisdiction to hear the claimant's appeal of the IRO decision or that the claimant waived the right to appeal the IRO decision as contended by the self-insured. We hold that the claimant timely and properly appealed the IRO decision pursuant to Rule 142.5(c)(2) and adhere to our holding in Appeal No. 040000-s, *supra*.

THE IRO DECISION

The record indicates that Claimant's Exhibit Nos. 1 through 8 were admitted without objection. The file provided to the Appeals Panel for review does not contain any of the claimant's exhibits. Those exhibits presumably included reports from doctors recommending spinal surgery and a carrier-required medical examination doctor who apparently agreed that surgery was the only remaining option. Inquiry of the administrative staff indicates that the exhibits were never forwarded with the file. Since these records are essential in conducting our review pursuant to Section 410.203 we have no alternative but to remand the case for reconstruction of the record or otherwise obtain copies of the claimant's exhibits.

As part of the self-insured's appeal is a report dated July 15, 2004 (4 days prior to the CCH), from Dr. W, a designated doctor appointed to assess MMI and IR.[1] Dr. W's report was received by the self-insured on July 28, 2004. Also in evidence is the IRO notice dated June 24, 2004. That notice upheld the self-insured's denial of authorization of the requested surgery because the claimant had a kidney removed in a donor nephrectomy (in 1996), and that the requested "procedure remains controversial in patients with the types of underlying conditions indicated for this patient" (the claimant is grossly overweight). Dr. W, in his July 15, 2004, report, references the IRO report, and in discussing MMI, comments that spinal surgery of the type recommended for the claimant "performed for pain complaints only have a disproportionally high level of failure," that the claimant because of her "body habitus" is "at extraordinarily higher risk for surgical complications as . . . she previously had a nephrectomy." Dr. W concludes

[1] We are aware of the provision in Rule 133.308(n) where the IRO may request the Commission to order an examination by a designated doctor, however, there is no evidence that Dr. W was appointed under that rule, rather it appears that Dr. W was appointed pursuant to Sections 408.122 and 408.125 to assess MMI and IR.

that he "would have reservations about surgical intervention of this magnitude resulting in any substantial improvement" and certifies the claimant at MMI on July 15, 2004, with a five percent IR based on Diagnosis-Related Estimate (DRE) Lumbrosacral Category II to include nonverifiable radicular complaints.

Although we do not normally consider evidence offered for the first time on appeal, to determine whether such evidence requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In this case Dr. W's examination was 4 days prior to the CCH and the report was not received until 9 days after the CCH, it is not cumulative or through lack of diligence that it was not offered at the CCH and we believe that Dr. W's comments regarding MMI and the proposed spinal surgery to be sufficiently material to the issue of whether the proposed spinal surgery is medically necessary as to possibly produce a different result. We hold Dr. W's July 15, 2004, report to be newly discovered evidence that could not have been reasonably discovered earlier.

We affirm the hearing officer's decision on the jurisdictional issue for the reason stated and we remand the case for the inclusion for review of Claimant's Exhibit Nos. 1 through 8, (Dispute Resolution Information System notes that the claimant had sought to have admitted are Hearing Officer's Exhibit No. 3), and for the hearing officer to consider Dr. W's July 15, 2004, report as newly discovered evidence with regard to the IRO decision and the issue of whether the claimant's proposed spinal surgery is medically necessary. The parties should be allowed to comment, and if necessary, present additional evidence regarding Dr. W's July 15, 2004, report as it pertains to the IRO decision on the issue of whether the claimant's proposed spinal surgery is medically necessary.

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 Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Margaret L. Turner
Appeals Judge

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Edward Vilano
Appeals Judge