APPEAL NO. 042926-s
FILED JANUARY 4, 2005

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 October 11, 2004, with the record closing on October 20, 2004. With regard to the two issues before her, 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 timely file his request for Medical Dispute Resolution (MDR).

The appellant (carrier) appeals, contending that it had not stipulated to venue, that an IRO should never have been appointed, and that the claimant's request for review (MDR) being untimely, the hearing officer did not "have jurisdiction to even consider the question posed by the IRO's decision." The claimant responded, contending that the Texas Workers' Compensation Commission (Commission) has jurisdiction, that venue was proper and that the IRO decision was supported by the preponderance of the evidence. The claimant also contends that the timely filing of the appeal of spinal surgery issue was "improperly admitted." In his conclusion the claimant states that "the Hearing officer ordered the Carrier to approve my surgery" and asks us to "order the Carrier to approve. . . surgery."

DECISION

Affirmed as reformed and clarified.

The claimant's response is timely as a response but not timely as an appeal. Section 410.202(a). The hearing officer's decision was mailed to the claimant on November 2, 2004, and pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) the claimant is deemed to have received the decision on November 7, 2004. Pursuant to Section 410.202(a) the claimant had until December 1, 2004, to mail an appeal to the Commission. The claimant's response is postmarked December 3, 2004, therefore while it is timely as a response it is not timely as an appeal. Therefore, we will not address the claimant's assertion that the timely filing of the appeal for surgery denial was "improperly admitted."

The record was not well developed, the claimant offered no exhibits and the carrier's exhibits are several inches of medical records, memos and various correspondence. Documents attached to the claimant's appeal are included in various of the carrier's exhibits. As the carrier alleges, and the hearing officer found, the carrier denied reconsideration for spinal surgery on December 29, 2003. Other preauthorizations for spinal surgery were denied in January and on April 9, 2004. Specifically in evidence is a denial of a request for L4-5 laminectomy and diskectomy with fusion for decompression dated April 9, 2004, which appears to be the last denial of reconsideration of spinal surgery. Rule 133.308 pertains to "Medical Dispute Resolution

by [IROs]." 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.

*See* Texas Workers' Compensation Commission Appeal No. 042573-s, decided December 6, 2004.

On June 7, 2004, MDR advised the claimant that the Request for Medical Dispute Resolution (TWCC-60) for necessity of a repeat MRI was incomplete. On June 21, 2004, the claimant filed a TWCC-60 for spinal surgery. Regardless whether the denial for spinal surgery was on December 29, 2003, as found by the hearing officer, or April 9, 2004, whichever was the last denial, the claimant's request for MDR filed on June 21, 2004, was untimely being filed more than 45 days after the carrier denied approval. *See* Appeal No. 042573-s, *supra*. Subsequently, on July 14, 2004, MDR advised the parties of "Notification of IRO assignment" for a "laminectomy/diskectomy with fusion." The IRO decision dated July 28, 2004, recommended a two-level laminectomy, discectomy with fusion, L4-S1.

First, the carrier contends that it did not stipulate that venue was proper in the Houston field office. Rather the carrier contends that the MDR request was actually about a repeat MRI so that jurisdiction lies with the State Office of Administrative Hearings (SOAH) and venue would be proper in Austin, Texas. Our review of the record indicates that the carrier is correct, in that they only stipulated that the claimant resided within 75 miles of that office. Accordingly we reform the stipulation to be that "The claimant resided within 75 miles of the (city 1) Field Office of the [Commission]." However as subsequently discussed we hold that the Commission has jurisdiction and venue was proper in Houston.

Next, neither party timely appealed the hearing officer's determination that the claimant did not timely file his request for MDR. The carrier then goes on to assert that after making that finding the hearing officer "did not have jurisdiction to even consider the question posed by the IRO's decision." We disagree with that contention. In a similar case, Appeal No. 042573-s, *supra*, where a request for MDR was not timely filed and we held that the Medical Review Division "should have dismissed the claimant's [request for MDR]." Similarly in this case we agree that the MDR request should have been dismissed as untimely, but the failure to do so does not deprive the Commission of jurisdiction over the claimant's spinal surgery process. We reject the carrier's contention that the hearing officer and/or Commission did not have jurisdiction over the spinal surgery dispute resolution process.

Regarding whether the IRO decision was supported by a preponderance of the evidence, we observe, as we did in Appeal No. 042573-s, *supra*, that had the IRO been properly appointed, the IRO's decision would have been supported by sufficient evidence. In this case we do feel compelled to point out that because the claimant did not timely file his request for MDR the carrier is not liable for medical benefits for spinal surgery at this time.

Although we are affirming the hearing officer's decision that the IRO decision is supported by a preponderance of the evidence, because the claimant did not timely file his request for MDR the carrier is not liable for medical benefits for the recommended spinal surgery at this time.

The hearing officer's decision and order are affirmed as reformed and clarified.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY**
**800 BRAZOS**
**AUSTIN, TEXAS 78701**.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Margaret L. Turner
Appeals Judge