

## APPEAL NO. 970638

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 March 10, 1997. With respect to the single issue before him, the hearing officer determined that the appellant (carrier) is liable for the proposed spinal surgery. In its appeal, the carrier argues that the hearing officer erred in determining that Dr. C, the respondent's (claimant) second opinion doctor, had concurred in the need for spinal surgery, and in concluding that it is liable for the cost of the spinal surgery. Alternatively, the carrier argues that the Texas Workers' Compensation Commission's (Commission) Medical Review Division did not follow the rules pertaining to the spinal surgery second opinion process in this instance and asks that we either reverse and render a decision in its favor or reverse and remand "the claim back to [Medical Review] or a [contested case hearing] with a finding that there is two to one nonconcurrence for surgery." The appeals file does not include a response from the claimant.

### DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury to her low back on \_\_\_\_\_. The claimant's treating doctor for her injury is Dr. S. On August 8, 1995, Dr. S performed a discectomy and fusion at L5-S1. In that surgery, Dr. S implanted hardware and a bone growth stimulator. In March 1996, the bone growth stimulator was removed. At the same time, Dr. S reexplored the claimant's spine and performed another instrumentation and fusion. In a Recommendation for Spinal Surgery (TWCC-63) dated November 22, 1996, Dr. S recommended hardware removal and a laminectomy and foraminotomy at L5-S1. Dr. S testified by telephone at the hearing. He stated that the instrumentation in the claimant's back is loose and that it needs to be removed. In addition, he testified that the claimant's fusion is solid but there has been an overgrowth of the bone, so he is going to remove the bony overgrowth at the same time he takes out the hardware. On cross-examination, he testified that he believes there is a 90% chance that the claimant's condition will improve when the hardware is removed. He also testified that if he operates on the claimant's spine again, he is going to do more than remove the hardware, noting that he is going to perform the laminectomy and foraminotomy as he recommended in his TWCC-63.

Dr. RS was selected by the carrier to serve as its second opinion doctor. In a report of December 17, 1996, Dr. RS concluded that the proposed surgery was not indicated. In a report dated January 6, 1997, Dr. C, the claimant's second opinion doctor, stated:

Based on her examination, history, and radiographic findings, I do not feel that this patient necessarily has to have this lumbar procedure to remove the plate, as it is not indicated, although it is advised by the FDA to be done. The pedicle screws were not placed according to FDA guidelines, but rather

were placed in an off-label manner, allegedly unbeknownst to the patient. [Claimant] desires to have these removed, and has been advised that it is not necessary in my opinion; however, since she is adamant to have this done, I will not hesitate in recommending it, although I do so reluctantly. The patient should have only the instrumentation removed, and not have any further operative procedures performed. She does not need any further neurologic decompression, as her symptoms are chronic. The likelihood of alleviating her back pain at this point is very low, and indeed, any further surgery may destabilize her or require further operative procedures for other levels in the future.

Dr. C also testified by telephone at the hearing. He stated that there was no medical indication for removal of the hardware other than the FDA requirements. He specifically stated that he does not agree that a laminectomy and foraminotomy should be performed and that if any surgery other than hardware removal surgery is performed, it would be "unnecessary" surgery. On cross-examination, Dr. C repeated that he was reluctant to recommend the hardware removal surgery because there is no medical reason for removal. However, he stated that he concurs with the recommendation for surgery to remove the hardware because of his belief that the FDA guidelines establish that if the patient wants the hardware in his or her spine removed, the surgeon is required to remove it.

After the Medical Review Division received Dr. C's January 6, 1997, report, it issued a letter dated January 29, 1997, concluding that the second opinion doctors had not concurred in the need for surgery and that, therefore, the carrier was not liable for the costs of surgery at that time. Dr. S testified, and the Spinal Surgery File Activity/Phone Log from the Medical Review Division confirms, that someone from Dr. S's office contacted the Medical Review Division and indicated that Dr. S believed that Dr. C's opinion was a concurrence. In response to that telephone call, Ms. A, the spinal surgery chief, contacted Dr. C. In notes of her conversation with Dr. C dated February 7, 1997, Ms. A states that "he says the FDA has specific guidance about removing pedicle screws re: if the patient wants them removed, they can be removed. File will be amended." On February 13, 1997, the Commission sent an amended letter advising the parties of the result of the spinal surgery second opinion process. In that letter, the Commission stated that one of the second opinion doctors had concurred in the recommended surgery, creating a two to one decision in favor of spinal surgery. That letter states that, in the absence of a timely appeal by the carrier, it "is liable for the reasonable and necessary costs of spinal surgery related to the compensable injury."

Initially, we will consider the carrier's argument that the hearing officer erred in determining that Dr. C's opinion was a concurrence within the meaning of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)). Rule 133.206(a)(13) defines concurrence as:

A second opinion doctor's agreement with the surgeon's recommendation that spinal surgery is needed. Need is assessed by determining if there are any pathologies in the spine that require surgical intervention. Any indication by the qualified doctor that surgery to the proposed spinal area . . . is needed is considered a concurrence, regardless of the type of procedure or level.

In arguing that Dr. C's opinion does not rise to the level of a concurrence under the rule, the carrier maintains that because Dr. C is basing his opinion on his belief that the FDA requires the removal of hardware at the patient's request, he is not stating that surgery is "needed" within the meaning of Rule 133.206(a)(13). The carrier notes that need is assessed by determining if there are pathologies in the spine that require surgical intervention. It contends that, because Dr. C does not believe that removal of the hardware is medically indicated but rather is required because of FDA guidelines, there is no "pathology" in the spine that requires surgical intervention and, therefore, Dr. C's opinion is not a concurrence in the "need" for spinal surgery. We are unprepared to state that the presence of hardware in the claimant's spine is not a pathology for purposes of Rule 133.206. The carrier cites our decision in Texas Workers' Compensation Commission Appeal No. 960138, decided February 29, 1996, in support of its contention that Dr. C's opinion is not a concurrence. We do not find that that case mandates reversal herein. In Appeal No. 960138, the second opinion doctor noted that all of the claimant's x-rays, range of motion, gait, reflexes and sensory and motor responses were normal. He concluded his report by stating that the decision of whether or not the claimant should have surgery is between the doctor and the patient. Appeal No. 960138 reversed the hearing officer's determination that the carrier was liable for surgery, noting that the second opinion doctor had not indicated that there were abnormal pathologies in the spine or clearly expressed any agreement that spinal surgery was needed. As a result, Appeal No. 960138 remanded the case to obtain clarification from the doctor as to whether or not he concurred in the need for spinal surgery. Appeal No. 960138 emphasized that it is the "clear statement of agreement" which is of primary importance in determining whether a doctor's opinion is a concurrence or a nonconcurrence in the need for surgery. In this instance, although Dr. C demonstrates a reluctance to concur, we cannot agree that he did not express a clear agreement with the hardware removal surgery. The hearing officer's determination that Dr. C's opinion was a concurrence is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for reversing that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)

The carrier also argues that, under the guidance of Texas Workers' Compensation Commission Appeal No. 962173, decided December 12, 1996, the Medical Review Division "acted beyond its authority" in sending an amended letter advising the parties of the result of the spinal surgery second opinion process. Specifically, the carrier argues that the Medical Review Division was without the authority to revise its interpretation from a determination that the carrier was not liable for the costs of surgery to a determination that it was liable for the reasonable and necessary surgical costs. We find no merit in this assertion. In Appeal No. 962173, one of the second opinion doctors issued a report stating

that he did not concur in the need for the proposed surgery. Thereafter, treatment notes from that doctor were submitted to the Medical Review Division, stating that if after full consideration the claimant determines that his pain level is severe enough to warrant accepting the risks of surgery, "then by all means it should be done." Apparently, based upon that treatment note, the Medical Review Division determined that the second opinion doctor had amended his report and was changing a nonconcurrency to a concurrence. Thereafter, the Medical Review Division issued an amended recommendation, stating that the carrier was liable for the costs of the proposed surgery. As Appeal No. 962173 noted, Rule 133.206 has specific procedures for resubmission of a spinal surgery request and for the submission of an addendum report by the second opinion doctor which were not followed. That is not what happened in this case. Dr. C did not change his opinion. Rather, the Medical Review Division changed its interpretation of his opinion after seeking clarification from Dr. C as to the nature of his opinion. We believe that, where, as here, there is some ambiguity in the second opinion doctor's opinion, efforts to obtain clarification from the doctor issuing the opinion is to be encouraged. Appeal No. 962173 should not be interpreted as a prohibition of such efforts.

The hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge