APPEAL NO. 971072

This appeal is brought 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 April 14, 1997. He (hearing officer) determined that the respondent's (claimant) request for spinal surgery should be approved. The appellant (carrier) appeals this determination arguing that the hearing officer committed legal error by improperly refusing to consider all the evidence admitted at the CCH. The claimant replies that the decision is correct, supported by sufficient evidence, and should affirmed.

DECISION

Reversed and remanded.

The claimant sustained a compensable back injury on _____. On December 12, 1996, Dr. V, the claimant's treating doctor, recommended spinal surgery to include fusion, laminotomy and internal fixation. The carrier selected Dr. MG as its second opinion doctor. In a report of January 8, 1997, he did not concur in the recommendation for spinal surgery, giving as reasons the lack of objective findings suggestive of active lumbar radiculopathy. He considered the claimant's pain to be secondary to degenerative disc disease. In his report, Dr. MG also referenced surveillance tapes of the claimant in which he "was not able to see any activity that would suggest this gentleman was having the degree of pain that he relates in the interview in the office today." The claimant selected Dr. M as a second opinion doctor. In a report of February 27, 1997, Dr. M concurred in the recommendation for spinal surgery based on the length of time the claimant has been experiencing pain and the failure of conservative treatment methods, but suggested a more current MRI examination before proceeding. Dr. MG then commented on Dr. M's recommendations and maintained his nonconcurrence.

Additional evidence offered by the carrier at the CCH and admitted without objection by the claimant was a report of Dr. B, who reviewed the surveillance tapes at the request of the carrier. In a report of November 21, 1996, which preceded Dr. V's recommendation for spinal surgery, Dr. B commented that the tapes showed the claimant could engage in the normal activities of daily living without restriction and that this was inconsistent with his complaint's of pain. For this reason, Dr. B had "serious doubts" about "operative intervention." According to the carrier, Dr. V declined to review the tapes.

At the CCH, the hearing officer announced that he would consider all the evidence admitted in reaching a decision on the issue of spinal surgery. Nonetheless, in his decision and order, he stated that he considered only the reports of Drs. MG, V, and M and concluded that the great weight of the medical evidence was not contrary to the recommendations of Dr. M and Dr. V for surgery. The hearing officer also specifically stated that the reports [sic] of Dr. B were not considered because Dr. B was not one of the three doctors "whose opinions are to be considered in a spinal surgery case." He did, however, consider an MRI report in evidence. With regard to the surveillance tape, he

stated that "[h]ad the video tape been considered by this hearing officer as part of the 'medical evidence,' my decision may have been otherwise." He then went on to say, somewhat inconsistently, that he did consider the tape to be "medical evidence" because Dr. MG reviewed it and specifically referenced it in his report. Finally, after stating he did not consider Dr. B's reports, the hearing officer stated in boilerplate fashion that "[e]ven though all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented."

The carrier argues on appeal that the hearing officer improperly excluded from consideration the report of Dr. B. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 133.206 (Rule 133.206) addresses the spinal surgery second opinion process. Subsection (k)(4) of the rule provides that "[o]f the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors." In Texas Workers' Compensation Commission Appeal No. 970801, decided June 17, 1997, we wrote:

> Texas Workers' Compensation Commission Appeal No. 961009, decided July 12, 1996, citing Texas Workers' Compensation Commission Appeal No. 960878, decided June 20, 1996, pointed out that the limitation in Rule 133.206(k)(4) in regard to "opinions" dealt with opinions as to recommended surgery; it indicated that prior medical records, even when addressing the possibility of surgery, were not restricted.

In Texas Workers' Compensation Commission Appeal No. 961009, *supra*, the Appeals Panel further explained:

> Texas Workers' Compensation Commission Appeal No. 960878, [*supra*], addressed the scope of admissible opinions and correctly held that "opinions" in the context of this subsection does not mean all medical records. (Note that Rule 133.206(k)(4) mentions both "opinions" and "medical evidence" indicating that they are distinguishable.) Appeal No. 960878, pointed out that the limitation as to opinions was set forth so that when surgery was recommended, a party could not blanket the fact finder with many doctors opinions favoring one party's side, as to whether the recommended surgery should be approved or not. As such, the limitation on opinions would not necessarily restrict a prior treating doctor's note prepared at the time of such treatment, that addressed surgery favorably or not; such note would be part of the medical evidence.

Consistent with the opinions referenced above, we conclude that it was error for the hearing officer not to consider Dr. B's report and give it the weight he deemed appropriate. *See* Section 410.165(a). The report was rendered before Dr. V recommended surgery, and even though it references surgery, it was not prepared as a way of "stacking the deck"

of opinions against surgery. Thus, even though Dr. B's report was not a "recommendation" or "opinion" as those terms are used in Rule 133.206(k)(4), on the proposed surgery, it was medical evidence relevant to the "great weight" determination required of the hearing officer in this case.

We are further troubled by the hearing officer's discussion of the videotape. He correctly pointed out that a videotape, in and of itself, need not be considered medical evidence. *See* Texas Workers' Compensation Commission Appeal No. 952106, decided January 24, 1996. However, as the hearing officer also stated, Dr. MG expressly relied on the videotape in his nonconcurrence in the proposed surgery. And a fair reading of Dr. B's admitted, though not considered, report suggests that Dr. B also placed significance on this videotape in reaching his conclusions. The hearing officer obviously believed the videotape was important because of his extensive discussion of why it should be considered "medical evidence." The result was that on the one hand, he concluded that it was "medical evidence" and on the other hand, commented that "had it been medical evidence" his decision "may have been otherwise." Under these circumstances, that is, the hearing officer's failure to consider Dr. B's opinion and the contradictory statements in his discussion about the videotape, we believe that a remand to reconsider the evidence is appropriate.

For the foregoing reasons, we reverse the decision of the hearing officer that the carrier is liable for the costs of spinal surgery and remand for further consideration based on all the evidence admitted at the CCH. On remand, the hearing officer should give both Dr. B's report and the videotape the weight he deems appropriate as medical evidence that can be weighed against Dr. V's recommendation for surgery and Dr. M's concurring second opinion.

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. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Christopher L. Rhodes
Appeals Judge