APPEAL NO. 990059

On December 16, 1998, a contested case hearing (CCH) was held. The CCH 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 CCH was whether appellant (carrier) is liable for spinal surgery related to respondent's (claimant) compensable injury. Carrier requests reversal of the hearing officer's decision that spinal surgery is appropriate for claimant and that carrier is liable for the expenses of spinal surgery for claimant. No response was received from claimant.

DECISION

Reversed and remanded.

Section 408.026, regarding spinal surgery second opinion, provides that, except in a medical emergency, an insurance carrier is liable for medical costs related to spinal surgery only if: (1) before surgery, the employee obtains from a doctor approved by the insurance carrier or the Texas Workers' Compensation Commission (Commission) a second opinion that concurs with the treating doctor's recommendation; (2) the insurance carrier waives the right to an examination or fails to request an examination before the 15th day after the notification that surgery is recommended; or (3) the Commission determines that extenuating circumstances exist and orders payment for surgery.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206), regarding spinal surgery second opinion process was amended effective June 30, 1998, and the amended rule is effective for all Recommendation for Spinal Surgery (TWCC-63) forms filed with the Commission on or after July 1, 1998. Rule 133.206 as amended defines "concurrence" in Subsection (a)(13) as a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed, states that need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed that are likely to improve as a result of the surgical intervention, and describes types of spinal surgery. Prior to amendment, Rule 133.206(a)(13) defined "concurrence" as a second opinion doctor's agreement with the surgeon's recommendation that spinal surgery is needed, stated that need is assessed by determining if there are any pathologies in the spine that require surgical intervention, and further stated that 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. Rule 133.206 as amended defines "nonconcurrence" in Subsection 133.206(a)(14) as a second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed. Prior to amendment, Rule 133.206(a)(14) defined "nonconcurrence" as a second opinion doctor's disagreement with the surgeon's recommendation that spinal surgery is needed. Rule 133.206(k)(4) continues to provide that, of 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, and that the only opinions admissible at the hearing are the recommendations of the surgeon and the opinions of the two second opinion doctors.

Claimant injured her low back at work on _____. She said that conservative treatment, including injections and physical therapy, has not helped her back pain, that her condition has worsened, and that she wants to have back surgery. A radiologist wrote that a CT scan done in May 1995 showed central bulging at L5-S1 and that a central disc herniation could not be excluded. Dr. H is claimant's current treating doctor. In a TWCC-63 dated September 23, 1998, Dr. H diagnosed claimant as having lumbar disc disorder with myelopathy and recommended the following procedures: "(a) 22558 Anterior L5 S1 (b) 63047 Decomp. L5 S1 (c) 22625 Fusion L5 S1 (d) 22842 Fixation."

Dr. M, the claimant's second opinion doctor on spinal surgery, examined claimant and reviewed claimant's diagnostic studies on October 6, 1998, and, in a narrative report of the same date, wrote that a CT scan and discogram revealed an L5-S1 disc disruption. Dr. M diagnosed claimant as having discogenic pain with some radicular component and noted that she had not been responsive to conservative therapy. Dr. M recommended as follows: "Surgery is recommended for this patient. Risks and outcomes were discussed with the patient who understands and is apprehensive about having surgery." Dr. M does not mention in his report the type of spinal surgery recommended by Dr. H, does not state that he concurs with the need for the type of surgery recommended by Dr. H, does not state that he reviewed Dr. H's surgery recommendation, and does not state what type of spinal surgery he himself recommends. Dr. M simply states that surgery is recommended for claimant. On October 6, 1998, Dr. M signed a Commission form which provides a doctor with several choices for noting the results of a spinal surgery examination. Dr. M marked the choice "Yes, I concur that surgery is indicated for this patient." He did not mark the choice "Yes, surgery is indicated, but I recommend a different procedure." The form does not state what type of spinal surgery has been recommended.

Dr. G, carrier's second opinion doctor on spinal surgery, examined claimant and reviewed claimant's diagnostic studies on October 14, 1998, and he diagnosed claimant as having mild degenerative disc disease at L5-S1 and stated that "this examiner does not concur with the procedure proposed which is a 360 fusion with anterior decompression, fixation and posterior fusion." Dr. G also wrote that he believed that that procedure is not warranted and recommended that the claimant be "re-educated with some physical therapy and mechanics for her lower back." On the Commission form that gives a doctor choices for noting the results of a spinal surgery examination, Dr. G marked the choice "No, I cannot concur at this time because:" and partially underlined the subchoice that "More or a different type of non-surgical care should be tried." Dr. G testified that he is a board certified orthopedic surgeon and has performed spinal surgeries for many years. He said that claimant's physical examination was so close to being normal that, in his opinion, the claimant is better now than she would be with even minor surgery. He opined that claimant's pain would not improve with the fusion procedure recommended by Dr. G, which

he agreed was called a 360 degree fusion, and which he described as an anterior and posterior fusion with hardware at L5-S1, and that if that procedure were to be done, at best claimant's pain would remain the same and that the pain could get worse.

Carrier contended at the CCH that Dr. M's recommendation for spinal surgery does not constitute a concurrence under the definition of concurrence as amended effective June 30, 1998, because Dr. M did not state that he agreed that Dr. H's proposed type of spinal surgery is needed and that if Dr. M's report is considered a concurrence, then the great weight of the medical evidence is contrary to the need for the proposed type of surgery.

The hearing officer found that Dr. H, claimant's treating doctor, recommended that claimant have surgery; that Dr. G, the carrier's choice of doctor for a second opinion, recommended that claimant not have spinal surgery; that Dr. M, claimant's choice of doctor for a second opinion, recommended that claimant have spinal surgery; and that "the great weight of the medical evidence is not against spinal surgery for claimant at this time." The hearing officer concluded that "spinal surgery is appropriate for claimant at this time" and decided that carrier is liable for the expenses of spinal surgery for claimant. Carrier contends that the hearing officer erred by not making a finding on whether there was a concurrence for spinal surgery, as concurrence is defined in Rule 133.206(a)(13) as amended, and that the hearing officer's finding that Dr. M recommended that the claimant have spinal surgery is insufficient to support his conclusion that spinal surgery is appropriate because that finding does not equate to a concurrence under Rule 133.206(a)(13) as amended. Carrier also contends that the hearing officer erred in finding that the great weight of the medical evidence is not against spinal surgery and in concluding that spinal surgery is appropriate.

We agree with carrier that the hearing officer erred in failing to make a finding as to whether Dr. M's opinion constituted a concurrence as defined in Rule 133.206(a)(13) as amended; that is, whether Dr. M agrees that Dr. H's proposed type of spinal surgery is needed. The hearing officer's finding that Dr. M recommended that claimant have spinal surgery does not address the question of whether Dr. M agrees that Dr. H's proposed type of spinal surgery is needed. Consequently, we reverse the hearing officer's decision that spinal surgery is appropriate and that the carrier is liable for the expenses of spinal surgery for claimant and remand the case to the hearing officer for further consideration and development of the evidence and for further findings of fact.

We note that Dr. M did not state in his narrative report that he agrees that Dr. H's proposed type of spinal surgery is needed, and that, although he indicated on the Commission form that surgery is indicated and did not indicate that he recommended a "different procedure," nowhere does Dr. M mention the type of procedure that Dr. H has recommended. Under these particular circumstances, we believe that any misunderstanding as to whether Dr. M agrees with Dr. H's proposed type of spinal surgery can best be avoided by having the hearing officer write to Dr. M, asking him whether he agrees that Dr. H's proposed type of spinal surgery is needed and provide Dr. M with a copy of Dr. H's TWCC-63, with a copy of his own narrative report, and with a copy of the

definitions of concurrence and nonconcurrence as set out in Rule 133.206(a) as amended effective June 30, 1998. The parties should be given an opportunity to give the hearing officer their responses to Dr. M's reply and the hearing officer should also make findings with regard to the presumptive weight provision in Rule 133.206(k)(4).

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.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Alan C. Ernst
Appeals Judge