APPEAL NO. 990716

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 4 and March 18, 1999, a hearing was held. He determined that the absence of the appellant (carrier) at the March 4, 1999, hearing was based on good cause, and he then approved respondent's (claimant) request for spinal surgery. Carrier asserts that the hearing officer erred in determining that the 1998 request for spinal surgery was not a resubmission and was appropriately considered under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(e) (Rule 133.206(e)). Claimant replied that she agreed with the findings of fact.

DECISION

We reverse the decision of the hearing officer and render that an issue was not properly before the hearing officer for resolution. The parties may use the Texas Workers' Compensation Commission's dispute resolution system to resolve a dispute of whether the carrier is liable for spinal surgery if appropriate actions are taken.

The hearing officer stated in his Statement of Evidence that claimant felt pain when she bent to shut a gate at her place of employment in September 1995. The only issue at this hearing was whether spinal surgery should be approved.

Dr. S, in 1998, submitted a Recommendation for Spinal Surgery (TWCC-63) recommending that claimant have fusion surgery at L4-5. The second opinion doctors were Dr. D and Dr. E. Dr. E concurred in surgery, but Dr. D did not.

In 1996, Dr. P submitted a TWCC-63 recommending that claimant have fusion surgery--his recommendation did not list the level, but a second opinion doctor, Dr. Sc indicated that pain had been produced on discogram with an injection at L4-5. The hearing officer in his Statement of Evidence noted that "the diagnoses and the proposed surgical procedures differed only slightly on the two forms." That comment is fair concerning the two recommendations for spinal surgery before us.

Texas Workers' Compensation Commission Appeal No. 960899, decided June 24, 1996, addressed a resubmission of a recommendation for spinal surgery that did not submit the second recommendation to the original two second opinion doctors. Appeal No. 960899 pointed out that "there is no showing that [original second opinion doctors] were not available to consider . . . and render additional recommendations." In the case we have under review, claimant's 1996 recommendation by Dr. P was reviewed by Dr. Sc and Dr. D as second opinion doctors. While Dr. D was a second opinion nonconcurring doctor for both the 1996 and 1998 recommendations (and there is no indication as to how he was chosen in regard to the 1998 recommendation), there was no evidence presented as to why the 1998 recommendation was not provided to Dr. Sc for his reconsideration. Using Dr. E as a second opinion doctor for the 1998 submission without evidence as to the

availability of Dr. Sc, who was a nonconcurring second opinion doctor for the 1996 submission, is one reason to conclude that Rule 133.206(l) was not followed in this case.

Appeal No. 960899, *supra,* also pointed out that a "claimant should not be permitted to select doctors until a doctor is found who concurs with the need for spinal surgery." That statement is consistent with the thrust of Rule 133.206(l), which provides a condition under which a claimant "may" submit a recommendation for spinal surgery. The condition, which appears to become operable when there has been a prior nonconcurrence (*see* Texas Workers' Compensation Commission Appeal No. 981774, decided September 17, 1998, which allowed submission, not resubmission, after a prior withdrawal was made before any second opinion doctor had nonconcurred), is that the employee had a change of condition. *Also see* Rule 133.206(h)(8) which refers to using Rule 133.206(l) after withdrawal of a recommendation.

The hearing officer found that the claimant did not have a change of condition, and the second opinion of Dr. D did not reflect the two-step process provided by Rule 133.206(l); that rule provides that the treating doctor or surgeon submits the TWCC-63 to "both the second opinion doctors" and each then reviews the case to determine whether a change of condition has occurred as defined in Rule 133.206(a)(16). That rule defines a change of condition as a "documented worsening," or "new or updated diagnostic test results," or the "passage of time providing further evidence of the condition," or "follow up of treatment recommendations" previously recommended by a "second opinion doctor." Next, Rule 133.206(l) provides "[i]f documentation meets the criteria in subsection (a)(16), the second opinion doctors shall issue an addendum to the original decision . . . i." The finding that there was no change of condition provides a second basis for concluding that Rule 133.206(l) was not followed in this case. (We do not comment on the absence of a two-step process in Dr. D's 1998 nonconcurrence.)

In addition to Appeal No. 960899, *supra,* Texas Workers' Compensation Commission Appeal No. 952106, decided January 24, 1996, considered that two recommendations had been submitted, but it merely considered the initial recommendation with its two second opinions in affirming approval of spinal surgery based on the initial recommendation and concurring second opinion, saying that Rule 133.206(l) addressed change of condition not change of doctor.

While the hearing officer found that claimant did not have a change of condition, we observe that he made that decision in regard to the 1998 recommendation for surgery that was not treated as a resubmission under Rule 133.206(l). Claimant did answer a question as to whether her condition had "changed" by replying, "yes, it has changed"; she also said it has "worsened." She then described some problems that she now has which had been present in 1996. We note that Rule 133.206(l) provides for inquiring of the two original second opinion doctors, not the claimant, as to whether there has been a change of condition--as defined in Rule 133.206(a)(16).

The hearing officer pointed out in his Statement of Evidence that claimant was precluded from using the procedure in Rule 133.206(l), because there was no change of

condition, so "the only other procedure that was available to them was that in 133.206(e)." (Rule 133.206(e) provides for "Submission" of a request for spinal surgery.) To accept this observation as a generality could result in repeated submissions of virtually the same evidence by a succeeding treating doctor or surgeon--when there has been no "change of condition." We believe that Appeal No. 960899*, supra,* referred to such a sequence of events in the negative when it said that the "claimant should not be permitted to select doctors until a doctor is found who concurs with the need for spinal surgery."

As stated in Appeal No. 960899, "if the provisions of Rule 133.206(l) are complied with, there may be an issue for a hearing officer to decide." The decision is reversed; a new decision is rendered that an issue was not properly before the hearing officer for resolution.

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Joe Sebesta
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge