

APPEAL NO. 991255

This appeal arises 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 May 12, 1999. She (hearing officer) determined that the appellant (carrier) is liable for the cost of spinal surgery for the respondent (claimant). The carrier appeals this determination, contending that the hearing officer committed legal error in concluding that there was a proper second opinion concurrence in the recommendation for spinal surgery. The claimant replies that the decision is correct and should be affirmed.

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, 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.

The claimant sustained a compensable spine injury on _____. Surgery was performed on March 25, 1998, which the claimant described as unsuccessful. On January 19, 1999, Dr. R, the claimant's surgeon, recommended further surgery which is the subject of these proceedings. The recommended surgery consisted of a "decompression of the L4-5 and L5-S1 region with stabilization procedure from L4 to the sacrum. This includes discectomy and interbody fusions with posterolateral fusions as well." Dr. A, the carrier's second opinion doctor, nonconcurred in this proposed surgery. Dr. L, the claimant's second opinion doctor, on April 7, 1999, checked the block on a form supplied by the Commission which read: "YES, I concur that surgery is indicated for this patient." The form itself did not describe the surgical procedures in which Dr. L indicated concurrence. In a report intended to accompany the form, Dr. L wrote:

This patient has a failed back syndrome with degenerative disc disease and is my recommendation that he undergo at least an L5-S1 fusion and possible an extension into the L4-5 level, if indicated and found at the surgery to be scarred and degenerative. I would not recommend doing this unless it is involved at the time of surgery.

The question for resolution was whether Dr. L's comments constituted a concurrence within the definition contained in Rule 133.206(a)(13). The hearing officer found that Dr. L "agreed that Claimant's [sic] needs to undergo a fusion at L5-S1 and possibly at L4-5 if needed once the surgery has begun." Finding of Fact No. 3. The decision and order contained no discussion of her rationale for why Dr. L's opinion constituted a concurrence as defined by Commission rule. The carrier appeals this determination, arguing that Dr. L did not provide a "true concurrence." Specifically, it argues that Dr. L only concurred in an L5-S1 fusion with possible extension to L4-5, but did not agree with the proposed decompression or laminectomy. It requests either a reversal of the finding of carrier liability for final surgery and a rendering of a decision of non-liability or, alternatively, that the decision be reversed and remanded for further clarification from Dr. L.

Three recent Appeals Panel decisions under the latest version of Rule 133.206 resulted in a reversal and remand for further clarification of the second opinions. See Texas Workers' Compensation Commission Appeal No. 990547, decided April 29, 1999; Texas Workers' Compensation Commission Appeal No. 990059, decided February 19, 1999; and Texas Workers' Compensation Commission Appeal No. 983061, decided February 12, 1999. Each case stressed that under the latest version of the rule, there had to be a concurrence in the proposed type of surgery, not, as formerly, an indication merely that surgery was needed. In the case we now consider, the ombudsman suggested at the CCH that a concurrence in a recommendation for a fusion includes a concurrence in a recommendation for decompression and laminectomy, but that a concurrence in a recommendation for a laminectomy and/or decompression does not include a concurrence in a recommendation for a fusion. No evidence was provided for this proposition or its

applicability in this particular case. Because the new version of Rule 133.206 emphasizes the need for a concurrence in the proposed type of spinal surgery needed, we cannot conclude that Dr. L's opinion, particularly his use of the phrase "at least," constituted a concurrence in Dr. R's proposal. For this reason, and to avoid any misunderstanding of what Dr. L is concurring in, we reverse the determination of the hearing officer which found the carrier liable for spinal surgery and remand for further inquiry of Dr. L to determine if he agrees or concurs in each of the types of surgery recommended by Dr. R. After additional inquiry is completed, the parties should be afforded the opportunity to respond to Dr. L's comments. In her decision and order on remand, the hearing officer should make a specific finding of whether or not Dr. L agreed with the types of surgery recommended by Dr. R.

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

DISSENTING OPINION:

I dissent. Based upon Dr. L report, I believe there was a sufficient basis for the hearing officer to conclude that Dr. L concurred with the surgical procedure recommended by Dr. R. I would affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge