APPEAL NO. 991257
FILED JULY 19, 1999

Following a contested case hearing (CCH) held on May 20, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the appellant's (claimant) request for spinal surgery should not be approved and that the respondent (carrier) is not liable for the cost of surgery. Claimant contends that the hearing officer erred in determining that her second opinion doctor's report is a nonconcurrence, erred in determining that there was a change of condition as that term is defined in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(16) (Rule 133.206(a)(16)), and, apparently, improperly placed the burden of proof on claimant. The carrier urges in its response that the hearing officer's determination is sufficiently supported by the evidence.

DECISION

Reversed and rendered.

We note at the outset that although the hearing officer's decision and order states that claimant was assisted at the hearing by an ombudsman, the transcript of the proceeding reflects that claimant was represented by attorney.

No testimony was taken and the case was submitted by the parties to the hearing officer based upon documentary evidence and argument.

The documentary evidence includes a December 2, 1998, report from Dr. H which states that he reviewed claimant's medical records and examined her; that his impression is failed cervical surgery with possible delayed or nonunion of the fusion at C5-6 and definite evidence of pathology at C4-5; that he recommends she be seen again by a neurosurgeon or orthopedic spinal surgeon; and that "[s]he still has very, very significant ongoing problems that are unlikely to improve without further intervention."

On January 20, 1999, Dr. A, claimant's surgeon, wrote Dr. D, apparently claimant's family doctor, stating that in April 1985 he performed an anterior cervical discectomy with no fusion at C6-7; that in January 1998 Dr. E performed an anterior cervical discectomy and interbody fusion with allograft and plating [the report of Dr. P, the carrier's second opinion doctor, indicates this surgery was at the C5-6 level]; that claimant continues to have neck pain; that his impression is (1) status post anterior cervical discectomy with spontaneous fusion at C6-7, solid, (2) attempted cervical fusion at C5-6 with allograft with element of non-fusion, and (3) central and right-sided disc herniation at C4-5; and that he recommended more x-rays to check the status of C5-6. Dr. A wrote Dr. D on February 1, 1999, stating that the x-rays showed complete fusion at C5-6; that the CT post myelography shows evidence of disc herniation at C4-5; and that since C5-6 and C6-7 are fused, he feels he should take out the herniated disc at C4-5 and not fuse this level. The documentary evidence does not include the original Recommendation for Spinal Surgery

(TWCC-63) filed with the Texas Workers' Compensation Commission (Commission) by Dr. A, if indeed one was filed.

Dr. P's March 1, 1999, report reflects claimant's cervical injury treatment history as she reported it and the medical records Dr. P reviewed. Dr. P stated that the imaging results indicate a solid fusion at C6-7 and a healing fusion at C5-6; that he agrees with Dr. K who reported that claimant's symptoms in both arms do not correlate with the small abnormality at C4-5 on the right; that he, Dr. P, believes that claimant's chances of the proposed surgery being a success are reasonably low; and that he would not recommend surgery but instead a good rehabilitation program which claimant has not had since the January 1998 surgery. On March 3, 1999, Dr. P signed a Commission second opinion doctor form checking the block for "No, I do not concur. Surgery is not indicated for this patient." Upon claimant's objection on the grounds that only the opinions of her spinal surgeon and the two second opinion doctors can be considered, the hearing officer excluded the November 16, 1998, report of Dr. K from evidence. A March 8, 1999, letter from the Commission informed claimant that the carrier's second opinion doctor did not agree with the recommended spinal surgery and that if she wants to proceed she needs to select her second opinion doctor.

The March 16, 1999, report of Dr. B, claimant's second opinion doctor, states claimant's cervical injury treatment history including the operations at C6-7 and C5-6; that various tests reveal "quite a bit of motion at C4-5, the level above the last fusion, which appears to be intact"; and that there appears to be a foraminal encroachment at C4-5 on the right and a degree of stenosis. Dr. B concludes he agrees with "decompression and fusion" and that "[i]n view of the range of motion at C4-5 and the two-level fusion below, it would be reasonable to consider bone bank graft and plating at that level."

The Commission's April 1, 1999, letter to claimant, entitled "Result of Spinal Surgery Second Opinion Process," states that neither of the second opinion doctors agreed with her doctor's recommendation for spinal surgery or that one or both recommended more tests and, therefore, that the carrier is not responsible for the costs of spinal surgery at this time; that if one of the second opinion doctors recommended more tests, those tests may show that surgery is necessary; and that if she has the test, her surgeon should resubmit the recommendation for spinal surgery as described in Rule 133.206(l) and the Spinal Surgery department will then issue a letter which explains the new results of her second opinion exams. Neither Dr. P's nor Dr. B's second opinion report recommended more tests. The hearing officer's discussion of the evidence states that there were no new or additional tests.

Dr. A wrote Dr. R on April 19, 1999, stating that he saw claimant on that date to go over the reports of the second and third neurosurgical opinions; that claimant advised that Dr. P "did not agree with my recommendation of anterior cervical discectomy at C4-C5"; that Dr. B "did agree with the procedure of anterior cervical discectomy and interbody fusion at the level of C4-C5 and plating"; that the x-rays were again reviewed; that there is already an anterior cervical plate in for double plating and one would have to take out the

original plate and put in a new plate, which he thinks is superfluous; and that he is therefore recommending that he take the disc out and fuse it with claimant's own banked bone, not bone bank bone.

In evidence is a Disclosure and Consent form signed by claimant on April 19, 1999, reflecting that she consents to undergo "an anterior cervical diskectomy and fusion with autograft C4-C5." Also in evidence is Dr. A's "Amended" TWCC-63, which he signed on April 21, 1999, reflecting the diagnosis as herniated cervical disc and the recommended procedures as anterior cervical diskectomy, arthrodesis, and autograft. Also in evidence is Dr. B's "Amended" TWCC-63, which he signed on April 22, 1999, reflecting the same diagnosis and recommended procedures as are stated on Dr. A's form. Above the doctors' signatures is the statement that the submission of this form constitutes a recommendation for spinal surgery by the treating doctor. Also in evidence is the Commission's April 29, 1999, letter entitled "Result of Spinal Surgery Second Opinion Process" which notifies claimant that one of the second opinion doctors agreed with her doctor's recommendation for spinal surgery, creating a two to one decision in favor of spinal surgery and that, if the carrier does not file an appeal, it will be responsible for the costs thereof. Also in evidence is a Commission "Spineline Fax Response Form signed by Dr. B on May 16, 1999, checking the block for the statement, "Yes, I agree that the recommended procedure is needed."

With regard to the spinal surgery rule, we stated the following in Texas Workers' Compensation Commission Appeal No. 991255, decided July 19, 1999:

> 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 [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.
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> [Rule 133.206], regarding spinal surgery second opinion process, was amended effective June 30, 1998, and the amended rule is effective for all [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.

Rule 133.206(l) provides that if an injured employee has a change of condition (as defined in Rule 133.206(a)(16)) at any time after a nonconcurrence, the treating doctor or surgeon may submit a TWCC-63 to the division and to both second opinion doctors with documentation indicating the change of condition; that the second opinion doctors will review the documentation to evaluate the presence of the criteria listed in Rule 133.206(a)(16) prior to the submission of an addendum report; that if a second opinion doctor does not feel that the documentation meets the criteria, he or she shall submit a report indicating there is no change of condition; and that if a second opinion doctor feels the criteria are met, the doctor will issue an addendum report.

Rule 133.206(a)(16) defines change of condition as "a documented worsening of condition, new or updated diagnostic test results and/or the passage of time providing further evidence of the condition, or follow-up of treatment recommendations outlined by a second opinion doctor."

Not disputed are findings that by letter dated February 1, 1999, Dr. A, claimant's surgeon, recommended a diskectomy at C4-5 with no fusion; that by letter dated March 4, 1999, Dr. P did not concur with Dr. A's recommendation of performing a diskectomy at C4-5; that on March 8, 1999, the Commission notified claimant by letter that Dr. P had not concurred with the necessity of surgery; that by letter dated April 1, 1999, claimant was notified by the Commission that the carrier was not liable for the costs of spinal surgery related to the compensable injury; and that by letter dated April 29, 1999, the carrier was notified that one of the two second opinion doctors had agreed with Dr. A's recommendation of surgery and it was therefore liable for spinal surgery.

In addition to the conclusion that claimant's request for spinal surgery should not be approved and that the carrier is not liable for the costs of surgery, claimant challenges the following findings:

FINDINGS OF FACT

5. By report and response form dated March 16, 1999, [Dr. B] recommended Claimant undergo a decompression with fusion and that it would have been reasonable to consider a bone bank graft and plating, which constituted a non-concurrence pursuant to Rule 133.206(a)(13) , effective June 30, 1998, as a different procedure was added to [Dr. A's] recommendation.

* * * *

7. After receipt of the Commission's April 1, 1999, letter, Claimant met with [Dr. A] who changed his surgical recommendation to include a fusion but no plating at C4-5 and resubmitted his recommendation for surgery.

* * * *

9. The Commission acted beyond its authority in issuing an amended decision in favor of spinal surgery as there was insufficient evidence that the procedures for properly resubmitting the issue of spinal surgery were applied as [Dr. A's] new recommended procedure was not forwarded to [Dr. B] and [Dr. P] to review and respond.

10. The great weight of the medical evidence is not contrary to the presumptive weight of the non-concurrence opinions of [Dr. P] and [Dr. B].

In her discussion of the evidence, the hearing officer states that "[i]n this case there was a change of condition after the first Commission letter was issued on April 1, 1999 documenting a non-concurrence because such was a follow-up on treatment recommendations outlined by [Dr. B] (*See* definition of "change of condition"). However, both second opinion doctors were not provided [Dr. A's] resubmitted April 22, 1999 report (TWCC-63) for the purposes of review and response as required." The hearing officer goes on to state that the Commission, on its own, reopened the file after receipt of Dr A's amended TWCC-63 including the fusion; that in Texas Workers' Compensation Commission (Commission) Appeal No. 961748, decided October 21, 1996, the Appeals Panel remanded to give the second opinion doctors the chance to review the additional information underlying the resubmitted request for surgery; that the burden must be placed on claimants and carriers to seek clarification before the CCH and that, should they fail to do so, "the parties should be forced to follow the resubmission process"; that "[c]laimant's request for spinal surgery should not be approved, as the resubmission process was not followed." The hearing officer then states that if claimant wishes to pursue resubmission, she may wish to seek assistance in this regard, citing to Texas Workers' Compensation Commission Appeal No. 983065, decided February 16, 1999 (Unpublished). We regard the

decision in Appeal No. 961748, *supra*, as distinguishable on its facts because although the case involved an amended TWCC-63, there was new testing performed after the original TWCC-63 which implicated the application of Rule 133.206(l).

We disagree with the hearing officer's analysis because we do not view the evidence as establishing that following Dr. A's initial proposal for spinal surgery at C4-5 and the submission of the opinions of Dr. P and Dr. B, claimant underwent a "change of condition" as defined in Rule 133.206(a)(13). The evidence does not show a documented worsening of claimant's condition or new or updated diagnostic test results and/or the passage of time providing further evidence of the condition. As for follow up treatment recommendations outlined by a second opinion doctor, we view this portion of the definition as referring to treatment recommendations such as work hardening, injections or other conservative treatment modalities and not to adding a procedure to the proposed spinal surgery. Accordingly, the resubmission mechanism provided for in Rule 133.206(l) was not triggered. The evidence quite clearly shows that when Dr. A learned that Dr. B not only concurred with Dr. A's proposed discectomy at C4-5 but also felt that the operation should include fusion, Dr. A decided to recommend that the fusion (with or without new plating) be included in his proposed spinal surgery and submitted an amended TWCC-63 for that purpose. Rule 133.206(f) provides that the Medical Review division will notify the carrier via the carrier's Austin representative of any required TWCC-63 and that the carrier's representative is responsible for the receipt of and the response to TWCC 63s. The record is silent as to whether this procedure was followed and as to what steps, if any, the carrier took to obtain any comment from Dr. P on Dr. A's amended TWCC-63. The record does clearly reflect that Dr. B responded to the amended TWCC-63 and that he concurred with the surgery proposed by Dr. A in the amended TWCC-63.

Under the present posture of the case, we need not decide whether Finding of Fact No. 5 that Dr. B's March 16, 1999, report constituted a nonconcurrence because Dr. B also felt that a fusion should be performed is erroneous. Dr. A filed an amended TWCC-63 which included the fusion and Dr. B concurred. Presumably, the carrier received the amended TWCC-63 via its Austin representative and had the opportunity to respond. As noted, we do not find the evidence sufficient to support the hearing officer's Finding of Fact No. 9 regarding resubmission procedures and the Commission's acting beyond its authority. Finally, we necessarily find error in the hearing officer's having given presumptive weight to the "non-concurrence opinions" of Dr. P and Dr. B in Finding of Fact No. 10 because the evidence shows that Dr. B concurred in Dr. A's amended TWCC-63 which included the fusion procedure. As previously noted, Rule 133.206(k)(4) provides 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 unless the great weight of the medical evidence is to the contrary. We do not remand for the hearing officer to make a finding of fact about the great weight of the medical evidence because a finding that the recommendation of Dr. A in his amended TWCC-63 and the concurring opinion of Dr. B did not constitute the great weight of the medical evidence would not be upheld on appeal. We are also mindful of the intent of the legislature expressed in Section

408.026(b) (Spinal Surgery Second Opinion) that the Commission adopt rules that ensure that an examination required under this section is performed without undue delay.

The decision and order of the hearing officer is reversed and a new decision is rendered that claimant's request for spinal surgery is approved and that the carrier is liable for the costs of the surgery.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Tommy W. Lueders
Appeals Judge

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Elaine M. Chaney
Appeals Judge