APPEAL NO. 991877

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue involves a request for spinal surgery and an evaluation of second opinions that have been given. On August 5, 1999, a contested case hearing was held.

He held that appellant (claimant) did not have a second opinion which concurred not only in the need for surgery, but the type of surgery proposed.

The claimant appeals, arguing that the second opinion rejected by the hearing officer is in fact a true concurrence. The respondent (self-insured) responds that this was a matter of fact to determine, and that the hearing officer has correctly applied the applicable rules.

DECISION

Reversed and rendered.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) defines "concurrence" as:

> A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. 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. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

The claimant's doctor, Dr. V, recommended fusion surgery at L5-S1. One second opinion doctor, Dr. F, did not agree that surgery was warranted. The claimant's second opinion doctor, Dr. M, issued an opinion in which he stated that he believed a transcutaneous discal resection might be the preferable procedure due to obesity and diabetes. Claimant had a discogram. However, Dr. M recommended an updated MRI. We note that Dr. M said in this opinion that claimant could have fusion if the procedure he recommended as a first step was unsuccessful. The self-insured denied approval for this recommended test. Dr. M was contacted again, apparently by Dr. V, with a view toward rendering his final opinion in light of this denial so that an addendum could be filed. While a portion of Dr. M's letter was quoted as the basis for the hearing officer finding a nonconcurrence, the entire substance of Dr. M's comment on surgery is required to interpret his ultimate opinion. Dr. M said:

> I feel that your specific treatment plan for fusion is reasonable and viable, though were she my patient, I still would have preferred a transcutaneous fiscal resection. I am, however, aware that this is somewhat controversial in terms of treatment regimen, and feel that your thoughts of fusion, and your

particular approach to fusion to minimize trauma in this obese diabetic female, is reasonable and well founded.

Finally, Dr. S, the claimant's treating doctor who was also an orthopedic surgeon, stated in January 1999 that although claimant was adamant about having surgery, he did not think that she was a good surgical candidate. However, Dr. S was not a second opinion doctor.

In reviewing Dr. M's opinion, with a fair reading of and a reasonable interpretation given to the totality, we view this as a concurrence with both the need and type of surgery proposed by Dr. V, and reverse the determination of the hearing officer that it is not. We render an opinion that as there was a concurring second opinion, and as presumptive weight must be given to the two reports having the same result (Rule 133.206(k)(4)), the self-insured is ordered to pay for spinal surgery due to the presence of two concurring opinions in favor of surgery.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Gary L. Kilgore
Appeals Judge