APPEAL NO. 992957

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 8, 1999, a contested case hearing (CCH) was held. At issue was whether spinal surgery for the respondent, who is the claimant, should be approved.

The hearing officer approved surgery, finding two concurring opinions favorable to surgery.

The appellant (carrier) appeals, arguing that because the second opinion doctor did not expressly agree with the type of surgery proposed by the treating doctor, the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) were not met. There is no response from the claimant.

DECISION

We affirm.

All dates are 1999 unless otherwise stated. The claimant was injured on _____ while employed by (employer). At the time of the CCH, he was working.

Claimant's doctor was Dr. Y, who recommended a laminotomy and diskectomy with cages, on August 19th. The second opinion doctor chosen by the carrier was Dr. D, who examined the claimant and recommended against surgery on October 4th. He stated that he felt that claimant's expectations about the outcome of surgery were unrealistic, and other means of conservative management should be tried before considering a lumbar fusion.

The second opinion doctor for the claimant was Dr. P, who said that he agreed with the surgery recommended by Dr. Y. He also said that the type of surgery was up to the doctor attending the patient.

The hearing officer found that the general reference to the judgment of the attending doctor as to type of surgery did not cancel out the specific concurrence with the surgery recommended by Dr. Y. Dr. Y's recommended procedure was plainly spelled out.

Rule 133.206(a)(13) defines concurrence as:

> Concurrence - 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 (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) 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 simulators.

We believe it also important to point out that Section 133.206(a)(14) defines nonconcurrence to be a second opinion doctor's disagreement with the surgeon's recommendations that a particular type of spinal surgery is needed.

We cannot agree that the hearing officer's determination of the fact of a concurrence under this definition is against the great weight and preponderance of the evidence. The facts in this case are not similar to those in Texas Workers' Compensation Commission Appeal No. 991255, decided July 19, 1999, in which the second opinion doctor *sua sponte* recommended a particular procedure although generally concurring in a need for surgery. A concurrence with the type of proposed surgery does not mean that the second opinion doctor must come up with his own recommendation for surgery. In this case also, there clearly was no disagreement by Dr. P with the particular type of surgery that Dr. Y recommended.

We accordingly affirm the decision and order of the hearing officer as a proper application of the applicable spinal surgery rule, and find it sufficiently supported by the evidence.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge