APPEAL NO. 000286

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 18, 2000. In response to the issue of whether the respondent's (claimant) request for spinal surgery should be approved, the hearing officer determined that the appellant (carrier) is liable for the cost of spinal surgery. The carrier appeals, contending that the concurring second opinion is inadequate under the current rules and that the great weight of the medical evidence is against spinal surgery. The appeals file does not contain a response from the claimant.

DECISION

Reverse 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 the 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.

It is undisputed that claimant sustained a compensable neck injury on _____, unloading some equipment from a truck. Subsequently, in 1991, claimant "underwent an accipitocervical decompression for treatment of a Chiari malformation" by Dr. B. Claimant testified that carrier paid for half of that procedure. Although not entirely clear, claimant apparently continued to see Dr. B, who, in a report dated July 2, 1999, noted progression of claimant's cervical myelopathy. In a report dated August 27, 1999, Dr. B refers claimant to Dr. S for an assessment. Dr. S, in a report dated September 17, 1999, notes a worsening cervical condition, "intractable" pain and recommends surgery in the form of "an anterior cervical partial vertebrectomy with cadavar bone fusion and plating at the C4-5, C5-6 and C6-7 levels." The recommendation was submitted to the spinal surgery second opinion process on September 17, 1999.

Dr. Z, carrier's second opinion doctor, in a report dated October 26, 1999, comments on the proposed procedure, stating:

> I think that the proposed anterior surgery is relatively hazardous, fraught with complications and does not address the fact that the C3-C4 level would deteriorate rapidly with this long level fusion and the degree of deterioration in that disc at this time. I think it would be more appropriate to do a laminoplasty from C3 to C7 from the posterior side.

Dr. Z nonconcurred in the proposed surgery and checked "I would recommend a different TYPE of spinal surgery."

Claimant's second opinion spinal surgery doctor is Dr. R, who, in a report dated November 8, 1999, reviewed claimant's history, commented that claimant had brought her MRIs with her for review and concluded:

> IMPRESSION: Cervical spondylosis, multiple level involvement. I do not have the specific note from her surgeon indicating the specifics of surgery, but [claimant] indicates an anterior approach with some type of medical fixation, and I concur with [claimant's] need for surgery.

The Commission, in a letter dated November 22, 1999, advised claimant that a second opinion spinal surgery doctor had concurred in spinal surgery. Carrier disputed that finding on the basis that Dr. R's second opinion was not a true concurrence as defined in Rule 133.206(a)(13) because Dr. S recommended an anterior cervical procedure from C4 through C7 and Dr. R only "vaguely described the pathology as multilevel spondylosis." The hearing officer determined:

FINDINGS OF FACT

3. [Dr. B], [Dr. S], and [Dr. R] recommended that Claimant have spinal surgery and [Dr. Z] recommended that Claimant have a different spinal surgery.

4. The great weight of other medical evidence is not contrary to the recommendation for spinal surgery by [Dr. S] and [Dr. R].

Carrier appealed, contending that Dr. R did not provide a concurring recommendation in accordance with Rule 133.206(a)(13), citing Texas Workers' Compensation Commission Appeal No. 990059, decided February 19, 1999. Carrier also contends that Dr. Z's opinion "is more thorough, detailed and medically compelling."

The Appeals Panel has addressed this subject in at least four recent cases. *See* Texas Workers' Compensation Commission Appeal No. 983061, decided February 12, 1999; Appeal No. 990059, *supra*; Texas Workers' Compensation Commission Appeal No. 990547, decided April 29, 1999; and Texas Workers' Compensation Commission Appeal No. 991255, decided July 19, 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 this case there appears to be not only a difference of opinion as to the type of procedure to be used but also whether it is to be anterior at levels C4 through C7 as recommended by Dr. S, or posterior at levels C3 through C7. Dr. R, in his report, makes clear that he does not have Dr. S's recommendations "indicating the specifics of surgery" and relies on claimant's lay recollection of what she believes Dr. S's recommendation was. Dr. R gives no concurrence or nonconcurrence regarding the difference in proposed levels of the cervical surgery. 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. R's report constituted a concurrence in Dr. S's recommendation.

For this reason, we reverse the decision of the hearing officer which found the carrier liable for the proposed spinal surgery and remand for further inquiry from Dr. R, who should be given the specifics of the proposed surgery, including the levels involved, to determine if he agrees or concurs in the types and level of procedure recommended by Dr. S. After the additional inquiry is completed, the parties should be afforded an opportunity to comment on Dr. R's opinion. The hearing officer should then make specific findings whether there is agreement by two of the doctors regarding the proposed surgery.

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge