APPEAL NO. 000349

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 January 26, 2000. The issue at the CCH was whether the respondent's (claimant) request for spinal surgery should be approved. The hearing officer determined that the claimant's request for spinal surgery should be approved. In so doing, he found that although the claimant had not literally complied with the second-opinion procedure (set out in a rule he agreed was mandatory rather than directory) by making "one telephone call" to the Spinal Surgery Section of the Texas Workers' Compensation Commission (Commission), there was substantial compliance. He approved spinal surgery for two reasons: because presumptive weight should be accorded to two concurring opinions and because there were extenuating circumstances authorizing the Commission to order payment for surgery.

The appellant (carrier) appeals, requesting that we reverse the decision of the hearing officer and render a decision in its favor. The carrier points out that the recommendation for spinal surgery was withdrawn because the claimant failed to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §133.206(h)(7) (Rule 133.206(h)(7)). The carrier also points out that the hearing officer has failed to identify the extenuating circumstances that justify ordering payment of surgery. The claimant responds, urging affirmance and arguing that liberal construction of the 1989 Act should override literal interpretation of the rule. The claimant also urges that there are extenuating circumstances.

DECISION

Reversed and rendered that the carrier is not liable for the costs of spinal surgery. We note that the claimant is not precluded from resubmitting the request for spinal surgery in accordance with Rule 133.206(l).

The claimant sustained injury to her back on _____. Her doctor is Dr. G. Significantly, there are no opinions in evidence from Dr. G underlying the need for surgery or the nature of surgery recommended. There is only a Recommendation for Spinal Surgery (TWCC-63) dated June 1, 1999, initially submitted, and then apparently resubmitted on September 20, 1999. While this form includes certain codes, the record is not favored with any key decoding these. The reasons why Dr. G recommended surgery, or the nature of the surgery recommended, cannot be ascertained from any direct evidence in the record from Dr. G.

In response to this recommendation, the carrier sought examination by a doctor of its choice, Dr. L, an orthopedic surgeon. Dr. L filed a detailed two-page report of his examination on October 21, 1999, which recommended against surgery.

Dr. L noted that the claimant had a long course of conservative care and two MRIs, both of which showed a degenerative disc at L5-S1 with only a small posterior protrusion. Dr. L took some films of his own and noted the lack of instability or significant degenerative arthritis. He found normal sensation and muscle strength and reflexes. Straight leg raising was normal and the claimant had only minor discomfort when she flexed the right foot with her leg at 90E. He noted that she weighed 295 pounds and was 5'8" tall.

Dr. L, who had the benefit of Dr. G's notes and opinions, pointed out that the case was not a clear-cut surgical situation and noted that Dr. G had been hesitant about recommending it. Dr. L noted that he had talked with the claimant at length during his appointment to point out the risks attendant to surgery with a person of chronic obesity. Dr. L felt that the claimant was in a poor situation for surgery and noted that Dr. G had predicted only a 60% to 80% success rate. He said that if a discogram confirmed reproduction of her pain and if the claimant reduced her weight to 250 pounds, then he could concur with surgery. He concludes:

> Under the resent circumstances, without a discogram and in her present physical condition, I would not be able to concur. If a surgery were done, because of her weight I believe that the 5-1 discectomy should include PLIF, bilateral lateral fusion and spinal instrumentation. I would even throw in a battery and the kitchen sink to be certain, as repeat procedures in this type of weight patient are disasters and we'd pray for a one-time deal.

His faxed response to the Commission indicated that additional testing and treatment were necessary.

On October 25, 1999, the Commission informed the claimant of Dr. L's nonconcurrence. The letter stated that the claimant should select a doctor for her own second opinion and call to inform the Medical Review Division of her selection on or before November 14, 1999. An 800 number was provided. This letter repeated the importance of calling by November 14th and stated, in bold lettering:

> If you do not call us by November 14, 1999, your spinal surgery case will be closed and the insurance company will not be responsible (liable) for the costs of spinal surgery at this time. If your case is closed, you can re-open it later if your condition changes.

According to the records of the Commission, the spinal surgery file was closed on November 16th, because no selection was conveyed to the Spinal Surgery Section. A note that is crossed out for November 21st states that it was on this day that the claimant called to tell of her second-opinion appointment. The claimant testified that she called them, explained the circumstances and asked if she should still keep the appointment with her second-opinion doctor. She could not swear when this call occurred.

The claimant said that one of her other doctor's offices (Dr. D or Dr. B) made the appointment with Dr. GZ. She said that she expected her doctors to take care of it and, because they were "dragging their feet," she went over and sat in their office until they made the appointment. She confirmed that this occurred at the office of Dr. D on November 9th. She was counting on Dr. D to select a second-opinion doctor because she was not familiar with any of the choices. She said she left the office with her appointment slip in hand. While the claimant said she relied on Dr. D's office to make the appointment for her, there was no testimony that she also relied on or asked his office to contact the Commission on her behalf.

The claimant saw the second-opinion doctor, Dr. GZ, an orthopedic surgeon, on November 22, 1999. His report is brief. He stated that she had failed conservative care, and that her MRI showed a "significant disc protrusion" at L5-S1. The report makes no mention of the claimant's weight, nor her sensory or muscle testing. Dr. GZ apparently conducted some range of motion testing. He found reflexes equal for both extremities. He said that the surgery with which he concurred would be a laminectomy/discectomy and fusion.

The claimant put into evidence a memo that stated telephone numbers at the Commission had changed and that the number indicated on this form for the Spinal Surgery Section was different than that in the letter she received. However, this memo states at the top that all numbers were changing "except for our toll-free numbers."

The claimant, in presenting or closing her case, did not argue that there were, separate and apart from the second-opinion process, any extenuating circumstances as to why the Commission should approve the recommendation for surgery without a concurrence. We note that there were arguments made by counsel concerning the procedural history of the case that are not part of the evidence and thus cannot be considered as such.

The claimant argued that because the statute did not require anything more than a concurring second opinion, the rule setting up specific deadlines and notifications could not be applied to deprive her of payment for the surgery. The claimant further argued that Rule 133.206(h)(7)(C) only required the claimant to be notified that the failure to inform the division will result in closing of her file and that there was no rule directly requiring her to make the call.

On December 21, 1999, the Commission's Spinal Surgery Section sent out an "amended" letter notifying the parties of the results of spinal surgery, stating that there was a concurrence. (The carrier was found to have timely requested a CCH and the hearing officer's findings in this regard were not appealed.)

We must first turn to the matter of "extenuating circumstances." This is the basis upon which the Commission, separate and apart from the second-opinion process, may

order the carrier to pay for surgery where emergency medical conditions do not exist. Section 408.026(a)(3). As the carrier has correctly pointed out, the hearing officer has failed to describe or even indicate what such circumstances are. From what we can tell, the hearing officer has simply invoked this provision to circumvent the problematic issue of the failure by the claimant to comply with the rule, resulting in closing of her file. This was error by the hearing officer. As the finding of extenuating circumstances as the basis for ordering the carrier to pay for surgery is not supported by any evidence in this case, we reverse this finding and rationale for ordering the carrier to pay.

As introduction to our discussion of the 1989 Act and Rule 133.206, it is worth noting that the second-opinion process may be viewed as beneficial for both parties involved. Surgical procedures involve not only cost to the carrier, but also risk to the life or health of the insured worker. The second-opinion requirement ensures the medical necessity of the cost and risk.

In this case, the hearing officer has correctly noted that Rule 133.206(h)(7)(C), requiring that the Spinal Surgery Section be notified of the employee's choice of second-opinion doctor within 14 days, is mandatory. He has erred, however, in holding that the failure of the claimant to comply with this rule was nevertheless "substantial compliance" in the absence of notice merely because the appointment with the second-opinion doctor was made within 14 days.

This rule was promulgated in accordance with the statutory directive set out in Section 408.026(b). The 1989 Act and Rule 133.206 must be construed as an integrated whole; the CCH is not the forum for determining that provisions of the rule do, or do not, comply with the 1989 Act. We cannot agree that the doctrine of liberal construction supports clear provisions of the rules to be read out of existence. *See* Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999). Therefore, the claimant's argument that all she was required to do by the 1989 Act was obtain a second opinion agreeing with surgery is an incomplete argument because she (and the carrier) is also required to comply with the rules. We would note that Rule 133.206(e) actually contemplates that selection of the employee's second-opinion doctor should be made shortly after the TWCC-63 is submitted and it is only if the Commission receives a nonconcurrence from the carrier's choice of doctor and has not been informed of the claimant's choice that the Commission undertakes the procedures set out in Rule 133.206(h)(7).

Regardless of the claimant's argument that this rule does not require anyone to make an affirmative notification to the Spinal Surgery Section about the second-opinion appointment, Rule 133.206(h)(7)(C) plainly requires that such contact be made. Although the hearing officer disparages this somewhat in his decision by referring to the act of contact as a mere "one telephone call," notification to the Commission is the heart of this rule (not the scheduling of the second-opinion examination). We know of no legal theory by which conduct prescribed in a rule may be deemed "mandatory" and yet "substantial

compliance" with that rule may be found only from the actions preparatory to actual compliance. The analogy to the hearing officer's reasoning on this matter would be similar to the Appeals Panel holding that an appeal is timely filed if it was merely typed up within 15 days in the appellant's office. We cannot agree with the hearing officer's articulation that "adequately parallel" behavior fulfilled the requirement of notice to the Commission.

The consequences of failure to notify the Commission are expressly spelled out: the spinal surgery request will be withdrawn. That actually happened in this case. The only way provided for a reopening of the surgical issue is set out under Rule 133.206(h)(8), and that is through resubmitting the request with a showing of a change in condition, under Rule 133.206(l). The Commission is without independent authority under the rule to simply "reopen" a case it has already closed.

Consequently, we hold that because the spinal surgery file had been closed due to failure of a notice to the Commission, the Spinal Surgery Section was without authority to issue a letter based upon Dr. GZ's opinion; and that the hearing officer was likewise without authority to order payment for spinal surgery based upon an argued second concurring opinion.

Although not material to our decision in light of the procedural ruling, we question the hearing officer's finding that presumptive weight should be accorded to the "opinions" of Dr. G and Dr. GZ. As we noted above, there is no "opinion" in evidence from Dr. G. Other than the bare fact that surgery was recommended, the reasons for same or the procedure to be done are not in evidence (or any codes describing them have not been translated). To the extent that Dr. G's opinion is reflected at all, it is through the secondary observations of Dr. L, who noted that he observed hesitation in Dr. G's recommendation for surgery. Rule 133.206(k)(4) requires the CCH to evaluate "three recommendations and opinions" (emphasis added) in determining whether presumptive weight must be given to two opinions that reach the same result. We do not agree that the TWCC-63, standing alone, constitutes an "opinion," any more than the second-opinion doctor's results sheet is "an opinion."

The importance of medical opinions that may be substantively reviewed, not just arithmetically tallied, is underscored by Rule 133.206(k)(4) because only the opinions of the surgeon and the second-opinion doctors may be considered. Two concurring opinions need not be given presumptive weight if, substantively, the opposing opinion constitutes a "great weight of medical evidence." We are concerned that Dr. L has raised important questions about the claimant's physical condition going into the surgery which he felt posed a substantial risk which were not addressed at all by Dr. GZ and which appear not to have been evaluated by the hearing officer. Because the according of presumptive weight is surplusage in light of our threshold determination that the second-opinion process was closed before rendition of the second opinion, and that the carrier is not liable for the costs of surgery, we will not remand this issue for reconsideration by the hearing officer.

For these reasons, we reverse the decision of the hearing officer and hold that because of a failure of compliance with Rule 133.206(h)(7)(C), the spinal surgery file was closed, and the Commission was without authority to reopen the matter in the absence of resubmission of the recommendation under Rule 133.206(l).

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge