APPEAL NO. 000425

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 25, 2000. The hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved. He stated that the great weight was against the two concurring opinions because the second opinion doctor that agreed with the recommended surgery failed to "find" that the spinal surgery would be needed.

The claimant has appealed and points out that the doctor who agreed with surgery was the respondent's (carrier) choice of a second opinion doctor. The claimant argues that because the hearing officer found as fact that two doctors recommended spinal surgery, the hearing officer was required to give presumptive weight to these two opinions. The claimant points out that the surgeon recommending surgery has stated the basis for this recommendation, and there was agreement. The carrier responds that the claimant bears a burden of proving that one of two second opinion doctors favoring surgery also determined that there were spinal pathologies that would be improved with surgery. The carrier asserts that it cannot be merely presumed that the doctor who concurs in a recommendation also agrees that it is likely to improve the condition of an injured workers' spine.

DECISION

Reversed and rendered.

The claimant sustained a back injury on _____. Claimant was treated conservatively, and with injections, without relief of her back pain. She said she continued working but eventually had to stop due to increasing pain. She had low back pain going down her left hip. Claimant had an MRI and myelogram. Her doctor, Dr. B, noted on September 9, 1999, that there were degenerative changes at L4-5 with nerve root cutoff and arthrosis. (However, there appears to have been no herniation found.) He stated that he did not believe she would improve further without surgery. He noted this would entail decompression and instrumented fusion. The claimant testified that Dr. B told her that she may recover 80% or "be 80% well." Claimant is 53 years old, and stated that she was aware of the risks and dangers of surgery.

On September 15, 1999, she was seen in a required medical examination and the doctor, Dr. GH, stated that she was at maximum medical improvement because she had not improved over the last eight weeks, and he assessed a five percent impairment rating. He recommended a home exercise program.

The next day, Dr. B filed a recommendation for spinal surgery. The carrier's second opinion doctor was Dr. G, who examined the claimant on October 20, 1999, and concurred

with Dr. B's recommendation for surgery. Dr. G noted that the CT myelogram confirmed entrapment neuropathy at L4-5.

Although Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(h)(5) (Rule 133.206(h)(5)) states that if the carrier-selected doctor's second opinion results in a concurrence, an appointment with an employee-selected doctor may be canceled; there nevertheless was an examination on October 28, 1999, by Dr. Q. Dr. Q interpreted the CT myelogram as showing a disc bulge or herniation at L3-4 and L4-5. Dr. Q noted that the MRI found no evidence of spinal stenosis at any of the three lower lumbar levels. Dr. Q acknowledged that all conservative measures had been exhausted. However, Dr. Q recommended against surgery because of the stated belief that surgery would not significantly improve her condition, due to lack of findings on tests.

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 costs to the carrier, but also risks to the life or health of the insured worker. The second-opinion requirement ensures the medical necessity of the costs and risks.

Rule 133.206(k)(4) provides that presumptive weight will be given to the two opinions which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary.

In determining whether there was a second concurring opinion, the hearing officer has looked to the definition in the rule of what is considered to be a "concurrence." 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 (i.e. cervical, thoracic, lumbar, or adjacent levels of different area 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: [*various procedures enumerated in rule*].

Rule 133.206(i)(3) requires the second opinion doctor to submit a narrative report regarding his examination which states his "decision." However, there is nothing in the rule requiring the doctor to set forth in detail the basis for his decision in order for it to be considered a concurrence or nonconcurrence. We cannot find this requirement in the definition of "concurrence," as did the hearing officer, although we would agree that it should be part of the second opinion doctor's process in his/her analysis of the case. The carrier has cited no authority for its argument that a second opinion cannot be considered as a concurrence because it does not set forth the considerations of the second opinion doctor as to why the surgery is needed; in fact, in a footnote in its reply brief, it acknowledges that the rule imposes no such requirement. The carrier then argues that the claimant is required to prove, as an element of her case, that one of the two doctors recommending surgery also determined that it was needed in accordance with the considerations set forth in Rule 133.206(a)(13). We do not agree. A review of the adoption preamble indicates that the thrust of the change of definition of concurrence was to make clear that both doctors should agree with the type of surgery to be performed. 23 TEX. REG. 6447 (June 19, 1998). A concurrence would not be found if the second doctor agreed that surgery was needed, but did not agree that the type of surgery proposed would bring about improvement as opposed to another type of surgery.

The failure to set out the basis for the decision in the narrative opinion may cause the trier of fact to determine that the great weight of the other medical evidence is against the concurring reports. However, while the hearing officer had the option to find that Dr. Q's report constituted the great weight of medical evidence against Dr. B's and Dr. G's report, he did not do so. Rather, in this case the hearing officer has simply held that Dr. G's concurrence, which expressly agrees with the recommended surgery, is *in fact* not an agreement:

> Finding of Fact No. 4:
>
> The great weight of the other medical evidence is contrary to the recommendation for spinal surgery by [Dr. B] and [Dr. G] in that [Dr. G] did not agree that the spinal surgery is needed because of [Dr. G's] failure to find that the spinal surgery is likely to improve Claimant's condition.
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> In his discussion, he states:
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> Under Rule 133.206(a)(13), the opinion of [Dr. G] does not show need for surgery based on the pathologies and that surgery is likely to improve the condition. Therefore, Claimant's request is not approved.

There was no direct evidence in the record that Dr. G did not assess the need for surgery based upon the considerations set out in the definition of "concurrence." Because it appears that the hearing officer has based his decision solely on the failure of Dr. G's

report to describe the basis for his agreement, as the hearing officer indicates is required in Rule 133.206(a)(13), and there being no requirement in the rules for the doctor to do so, we reverse, and render the decision that presumptive weight must be accorded to the two concurring opinions on the need for surgery, and the carrier is liable for the cost of spinal surgery.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge