APPEAL NO. 001098

On April 10, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. The hearing officer resolved the disputed issue by deciding that respondent (carrier) is not liable for the recommended spinal surgery. Appellant (claimant) requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. Carrier requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

According to medical records, claimant had surgery at L4-5 in 1989. Claimant sustained a compensable back injury on _____. Dr. M, claimant's treating doctor, and Dr. W performed an L4-5 laminectomy and fusion on claimant in September 1997. Dr. W wrote in April 1999 that claimant should have a decompression and fusion with internal fixation from L4-S1. In July 1999, Dr. M recommended that claimant have another spinal surgery consisting of a re-exploration of the lumbar laminectomy at L4-5, a decompressive laminectomy at L5-S1, "BAK cages," and a "PIBF." Dr. L, carrier's second opinion doctor on spinal surgery, reported on November 9, 1999, that surgery is not indicated for claimant and that he did not concur with the need for surgery. Dr. LI, claimant's second opinion doctor on spinal surgery, reported on November 10, 1999, that:

> I think that a surgical exploration at L4 5 and possible repositioning the hardware is indicated. At the same time the degenerative disc disease that is present in L5 S1 certainly deserves a look at and assessment operatively as [Dr. W] suggested.
>
> Encouragement for cessation of smoking is paramount. I would not consider doing the surgery unless he is off smoking for three to six months. Hopefully this encouragement will be taken seriously. He is at extremely [sic] risk in terms of a candidate for surgery in his present condition and I remain dubious as to the outcome of the proposed surgery and the likelihood of him returning back to work with any type of performance.

Claimant testified that he has been trying to quit smoking for over a year, that he has cut down on his smoking, that he has not quit smoking, and that he intends to have quit smoking by the time surgery is scheduled.

Section 408.026 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) pertain to the spinal surgery second opinion process. Rule 133.206(a)(13) provides that a concurrence is a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed and 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. Rule 133.206(a)(14) provides that a nonconcurrence is a second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed. Rule 133.206(k) provides 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, and 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 recommendation of the surgeon and the opinions of the two second opinion doctors.

The hearing officer found that Dr. L disagreed with Dr. M's recommendation for spinal surgery and rendered a nonconcurring opinion, that Dr. LI rendered a nonconcurring opinion, and that the spinal surgery second opinions rendered by Dr. L and Dr. LI are not contrary to the great weight of medical evidence. The hearing officer concluded that carrier is not liable for the recommended spinal surgery. Claimant contends that the hearing officer misinterpreted Dr LI's opinion and that Dr. LI's opinion is a concurrence. Claimant states in his appeal that he has quit smoking in preparation for surgery. Given claimant's testimony at the CCH that he had not quit smoking at that time and Dr. LI's opinion that he would not consider doing the surgery unless claimant is off smoking for three to six months, we cannot conclude that the hearing officer erred as a matter of law in finding that Dr. LI's opinion was a nonconcurrence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur in all aspects of the majority opinion and write separately only to suggest that if, or when, the claimant has stopped smoking for three to six months, and if the treating doctor, Dr. M, resubmits the issue of spinal surgery pursuant to Rule 133.206(l), Dr. LI should reference Dr. M's recommendation rather than Dr. W's assessment and specifically concur, or non-concur, as defined in Rule 133.206(a)(13) and (14) to include the specific type of surgery involving the "BAK cages" and "PIBF." In this case, Dr. LI's non

concurrence is clear as the claimant, at the time of the evaluation and even at the CCH, had not stopped smoking and consequently had not met the condition placed on surgery by Dr. LI.

Thomas A. Knapp
Appeals Judge