APPEAL NO. 001414

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 May 17, 2000. The hearing officer determined that the appellant (carrier) waived the right to raise the issue of "no change in condition" under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(l) (Rule 133.206(l)) by not raising it in its request for the CCH; that the respondent's (claimant) surgeon, Dr. H, and the claimant's choice of second opinion spinal surgery doctor, Dr. C, recommended that the claimant have spinal surgery; that the great weight of the other medical evidence is not contrary to the recommendation for spinal surgery; and that the claimant's request for spinal surgery is approved. The carrier appealed; contended that the hearing officer erred in determining that it waived its right to contest whether the claimant had demonstrated a "change in condition" since the prior CCH which denied spinal surgery; urged that the claimant has not proved a change of condition after a nonconcurrence as required by Rule 133.206(l), that Dr. C's opinion does not constitute a concurrence within the context of Rule 133.206(l), and that the great weight and preponderance of the other medical evidence clearly indicates that spinal surgery should not be approved; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to spinal surgery. In the alternative, the carrier requested that the Appeals Panel reverse the decision of the hearing officer and remand the case for the adjudication of the question of whether the claimant is entitled to spinal surgery under Rule 133.206(l). A response from the claimant has not been received.

DECISION

We reverse and remand.

We first address the waiver question. At the CCH, the question of waiver was not raised and neither party made an argument concerning it. It is undisputed that a recommendation for spinal surgery in 1998 was not approved.

Section 408.026 provides:

SPINAL SURGERY SECOND OPINION.

(a) 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 commission [Texas Workers' Compensation 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 date of the notification that surgery is recommended; or

(3) the commission determines that extenuating circumstances exist and orders payment for surgery.

(b) The commission shall adopt rules necessary to ensure that an examination required under this section is performed without undue delay.

Rule 133.206(k) provides:

(k) Appeal to a [CCH].

(1) An employee may appeal to a CCH if there is no second opinion concurrence.

(2) A carrier may appeal to a CCH if there is a second opinion nonconcurrence.

(3) The appeal must be filed within 10 days after receipt of notice from the commission regarding carrier liability for spinal surgery. The appeal must be filed in compliance with §142.5(c) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes). The contested case will be scheduled to be held within 20 days of commission receipt of the request for a CCH. The hearings and further appeals shall be conducted in accordance with Chapters 140-143 of this title (relating to Dispute Resolution/General Provisions, Benefit Review Conference, Benefit [CCH], and Review by the Appeals Panel).

(4) Of the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which have the same result, and they will be upheld unless the great weight of medical evidence is to the contrary. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

Rule 142.5(c)(1) provides:

Requesting a hearing. A party may request the Commission to set a benefit [CCH]. The request shall be made in the following manner:

(1) If the party is represented, the request shall:

(A) be made in writing and signed by the requestor;

(B) identify and describe the disputed issue or issues;

(C) state the reason for requesting the hearing;

(D) be sent to the Commission; and

(E) be delivered to all the other parties, as provided by §142.4 of this chapter (relating to Delivery of Copies to All Parties).

Rule 133.206(l)(1) provides:

(l) Resubmitting the Issue of Spinal Surgery.

(1) If the injured employee has a change of condition at any time after a nonconcurrence, the treating doctor or surgeon may submit a TWCC-63 [Recommendation for Spinal Surgery] to the division and to both the second opinion doctors with documentation indicating the change of condition as defined in subsection (a)(16) of this section. The second opinion doctors will review the documentation for the purpose of evaluating the presence of criteria listed in subsection (a)(16) prior to submission of an addendum report. If in the doctor's opinion the documentation does not meet the criteria of subsection (a)(16), the second opinion doctor shall submit a report to the division and the treating doctor or surgeon indicating there is no change in condition. If documentation meets the criteria in subsection (a)(16), the second opinion doctors shall issue an addendum to the original decision and send a copy to the division, the treating doctor, the surgeon, and the carrier with the word "ADDENDUM" clearly indicated on the narrative report. Addendum decisions, reports, records, and payments, and appeal to a CCH are governed by all of the provisions of this section. If the addendum second opinions result in carrier liability, any pending appeal shall be dismissed.

The Commission's Disputed Issue Code contains one issue for spinal surgery, "SO! Spinal Surgery." The carrier's request for a CCH is made on what appears to be a carrier form that states "I hereby request a [CCH] be scheduled in [City] pursuant to Rule 133.206 due to Non-Concurrence of Opinion on Spinal Surgery" and in a block labeled "Identification of Dispute" states "NECESSITY OF SPINAL SURGERY." At the CCH, the

hearing officer asked the parties if they concurred that the only issue "is whether the Claimant's request for a spinal surgery should be approved." Both persons representing the parties responded "yes." The hearing officer asked "[d]id you have another issue regarding whether [Dr. C] recommended for or against the spinal surgery, then?". The attorney representing the carrier said that it would be one of its theories and the person representing the claimant responded "[i]sn't that normally assumed in the issue we have, I think?". The hearing officer responded:

> It will be some issue but the other issue is of whether the Carrier should be liable for the cause [sic, cost] of the spinal surgery so I will allow you to present any evidence arguing what we have on the matter.

The Appeals Panel has held that dispute resolution proceedings are not governed by strict rules of pleading. Texas Workers' Compensation Commission Appeal No. 950061, decided February 24, 1995. *See* Texas Workers' Compensation Commission Appeal No. 962247, decided December 23, 1996, for quotations from 73 TEX. JUR. 3d Waiver and references to case citations. The issue of whether a carrier is liable for medical costs related to spinal surgery may contain more than one factual question to be resolved. The case before us involves "Resubmitting the Issue of Spinal Surgery" under the provisions of Rule 133.206(l). That rule requires a change of condition before the resubmitted request for spinal surgery may be approved. Change of condition is defined in Rule 133.206(a)(16). The claimant has the burden of proving a change of condition. *See* Texas Workers' Compensation Commission Appeal No. 961748, decided October 21, 1996. Considering the provisions in the 1989 Act, Commission rules, Appeals Panel decisions, and the record in the case before us; the hearing officer erred making Finding of Fact No. 11 that the carrier waived its right to raise the issue of "no change in condition" under Rule 133.206(l) by not raising it in its request for a spinal surgery CCH. We reverse Finding of Fact No. 11 and remand for the hearing officer to make findings of fact and a conclusion of law to determine whether the "change of condition" requirement in Rule 133.206(l) has been met.

We next address the questions of whether a second opinion doctor concurred with the recommendation of the surgeon that the claimant have spinal surgery and, if so, whether the great weight of medical evidence is contrary to the recommendation for surgery and the opinion concurring with the recommendation for surgery. The hearing officer made Finding of Fact No. 9 that states "[Dr. H) and [Dr. C] recommended that Claimant have spinal surgery" and Finding of Fact No. 12 that "[t]he great weight of the other medical evidence is not contrary to the recommendation for spinal surgery." The provisions of Rule 133.206(k)(4) are set forth earlier in this decision. Rule 133.206(a) contains definitions and Rule 133.206(a)(13) states:

> 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 stimulators.

At the CCH, the carrier argued that the report of Dr. C did not meet the requirements of a concurrence in the rule and that other reports indicate that there is no pathology that would require spinal surgery. In Texas Workers' Compensation Commission Appeal No. 971357, decided August 28, 1997, the Appeals Panel held that a concurrence must be based on pathology that requires surgical intervention. The hearing officer did not make a finding of fact of whether the report of Dr. C is a concurrence as defined in Rule 133.206(a)(13). We remand for him to do so. Since he did not make such a finding of fact, we reverse Finding of Fact No. 12 because there is not a finding of fact on which to grant presumptive weight to a recommendation and a second opinion with the same result. If the hearing officer determines that the report of Dr. C is a concurrence, he should then make a finding of fact whether the great weight of the other medical evidence is contrary to the recommendation of Dr. H and the concurrence of Dr. C.

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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge