APPEAL NO. 001625

On June 16, 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 of whether appellant (carrier) is liable for spinal surgery by deciding that carrier is liable for the expenses of spinal surgery related to respondent's (claimant) compensable injury. Carrier requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. Claimant requests that the hearing officer's decision be affirmed.

DECISION

Reversed and remanded.

The parties stipulated that on _____, claimant sustained a compensable injury to her cervical spine. She had two previous cervical surgeries in 1996 and 1999. In a Recommendation for Spinal Surgery (TWCC-63), Dr. P, who is a neurosurgeon and claimant's treating doctor, recommended in April 2000 that claimant undergo a laminectomy and implantation of a dorsal column stimulator. Dr. P is shown as the surgeon on the TWCC-63. Carrier's second opinion doctor, Dr. O, wrote that he was seeing claimant for an opinion on a dorsal column stimulator, without mention of the laminectomy procedure. It is clear from Dr. O's report that he did not concur that surgery is indicated. Dr. T, claimant's second opinion doctor, wrote in his narrative report that he was seeing claimant for a second surgical opinion for implantation of a dorsal column stimulator and that "I agree that the recommended procedure is needed." Dr. O made no mention of the recommended laminectomy procedure. In a Spineline Fax Response Form, Dr. T checked off the line that stated, "Yes, I agree that the recommended procedure is needed."

There is no appeal of the hearing officer's finding that Dr. P recommended a cervical laminectomy and implantation of a dorsal column stimulator and that Dr. O did not agree with the need for the type of surgery proposed by Dr. P. Carrier appeals the hearing officer's findings that Dr. T agreed with the surgery recommended by Dr. P, that there were two opinions in favor of the proposed spinal surgery, that presumptive weight is given to the opinions of Dr. P and Dr. T, and that the great weight of the medical evidence is not against spinal surgery for claimant. Carrier also appeals the hearing officer's conclusion that carrier is liable for the expenses of spinal surgery related to claimant's compensable injury. Carrier contends that Dr. T considered the proposed surgery to be only for the implantation of the dorsal column stimulator and that "since he did not agree with the laminectomy, the criteria of a 'concurrence' was not met." Carrier further contends that the hearing officer should have accorded presumptive weight "to the two nonconcurring opinions, those of [Dr. T] and the carrier-selected doctor, [Dr. O]."

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206), regarding the spinal surgery second opinion process, defines "concurrence" in subsection (a)(13) 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 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.

Rule 133.206(a)(14) defines "nonconcurrence" as:

> A second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed.

Rule 133.206(k)(4) provides:

> 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. The only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors.

It is unclear whether Dr. T, in stating in his narrative report that he agreed that the "recommended procedure" is needed and in checking off on the Spineline Fax Response Form that he agrees "that the recommended procedure is needed," was aware that Dr. P is recommending a laminectomy in addition to implantation of a dorsal column stimulator because Dr. T's narrative report states that he was seeing claimant for a second opinion for implantation of a dorsal column stimulator without mention of the proposed laminectomy.

We reverse the hearing officer's decision and remand the case to the hearing officer for further consideration and development of the evidence. The hearing officer should send Dr. P's TWCC-63 to Dr. T and request Dr. T to provide a written opinion as to whether he agrees with Dr. P's proposed type of surgery, cervical laminectomy and implantation of a dorsal column stimulator. The parties should be given an opportunity to provide the hearing officer with their comments regarding Dr. T's report.

In Texas Workers' Compensation Commission Appeal No. 001416, decided August 2, 2000, the Appeals Panel affirmed a hearing officer's decision approving a claimant's request for spinal surgery where the TWCC-63 recommendation for spinal surgery included

an anterior and posterior fusion and a laminectomy/decompression and claimant's second opinion doctor agreed with the proposed fusion in his narrative report, apparently without specifically addressing the laminectomy procedure. The Appeals Panel held that claimant's second opinion doctor's checkoff on the Spineline Fax Response Form line, "Yes, I agree that the recommended procedure is needed"constituted a concurrence with the proposed type of spinal surgery in the TWCC-63. We believe that Appeal No. 001416 is distinguishable from the facts of the instant case in that, ordinarily, we have seen that a fusion procedure is recommended where some form of surgery like a decompressive procedure to an intervertebral disc is also recommended. In other words, the stabilizing procedure follows the decompressive procedure. In the instant case, claimant has had two prior cervical surgeries, including a fusion, and there is not a readily apparent connection between the recommended laminectomy and the recommended dorsal column stimulator such that we can assume that Dr. T's opinion, which appears to address only the stimulator, is also addressing the laminectomy procedure.

The hearing officer's decision and order are reversed and the case is remanded to the hearing officer for further consideration and development of the evidence. 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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Robert W. Potts
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Thomas A. Knapp
Appeals Judge