

## APPEAL NO. 001808

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 July 12, 2000. On the single issue before him the hearing officer determined that the appellant's (claimant) request for spinal surgery should not be approved. The claimant appealed on the grounds of sufficiency of the evidence. The respondent (carrier) replied that the evidence was sufficient to support the hearing officer's determination and should be affirmed.

### DECISION

Affirmed.

The hearing officer accurately and fairly set out the evidence in his decision and order and we offer only a brief discussion for the purposes of this appeal. The claimant sustained an injury to his back on \_\_\_\_\_, which required a lumbar decompression/discectomy in 1996. A spinal column stimulator was implanted in 1997. A lumbar fusion was performed at L5-S1 in July 1999, but the claimant's low back pain persisted. The claimant's surgeon, Dr. P, recommended another lumbar surgery with decompression and fusion at L3-4 and L4-5.

The claimant was examined by Dr. G for a second opinion on spinal surgery. Dr. G indicated on his SpineLine Fax Response form dated March 30, 2000, that he did not concur because he recommended a different type of spinal surgery. The narrative letter submitted by Dr. G reflected that he did not concur with the recommendation for a posterior lumbar interbody fusion with discectomies at the L3-4 and L4-5 levels. He wrote that if surgery was to be contemplated he felt the only procedure that would be helpful may be a lumbar discectomy on the left at the L4-5 level. Dr. G felt that a fusion was not indicated.

The claimant was examined by Dr. D on April 14, 2000, who indicated on his SpineLine Fax Response form that he did not concur with the need for surgery. His letter also discussed the claimant's medical history and current examination findings and he concluded that the claimant would not benefit from further surgery.

The claimant contends that the treating surgeon's recommendation for spinal surgery is satisfied if Dr. G indicates that surgery is needed regardless of disagreement over the type of procedure. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) was amended on June 30, 1998, which specifically provides that a concurrence may be found only when there is an agreement to the proposed type of surgery

Section 408.026 and 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 nonconcurrency 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)(4) 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; that they will be upheld unless the great weight of the medical evidence is to the contrary; and that the only opinions admissible at the hearing are the recommendations of the surgeon and the two second opinion doctors.

The hearing officer found that Dr. D and Dr. G did not agree with Dr. P's recommendation for spinal surgery, and that these two opinions from Dr. D and Dr. G were not contrary to the great weight of medical evidence. He concluded that the carrier is liable for the costs of spinal surgery. We cannot conclude that the hearing officer erred as a matter of law in finding that Dr. D and Dr. G did not concur with Dr. P's recommendation for spinal surgery.

We affirm the hearing officer's decision and order.

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Kathleen C. Decker  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Robert E. Lang  
Appeals Panel  
Manager/Judge