APPEAL NO. 002000

This appeal arises pursuant to the Texas Workers' Compensation Commission Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 3, 2000. With regard to the only issue before him the hearing officer determined that two doctors had concurred on claimant's spinal surgery and that the carrier is liable for the costs of such surgery. Carrier appeals contending that its second opinion spinal surgery doctor who had non-concurred did not have all the records present when he non-concurred, that he had recommended additional testing, that therefore the Texas Workers' Compensation Commission (Commission) rules had not been followed, and that claimant had had surgery prior to the CCH. Carrier asserts that it should be relieved of liability for the surgery and requests that we reverse the hearing officer's decision. Claimant responds requesting affirmance.

DECISION

Affirmed

The background facts are not in dispute. Claimant has had five prior surgeries in 1986, 1987, 1995, 1996, and 1999. Claimant agreed that he had done "fairly well" until about six months prior to the hearing. Claimant's treating doctor/surgeon, Dr. D believed that the cause of claimant's current complaints and pain was hardware at the L3-4 level which had been inserted in a prior surgery. In a Recommendation for Spinal Surgery (TWCC-63) dated May 5, 2000 (all dates are 2000), Dr. D recommended surgery in the form of "Hardware Removal." Dr. L carrier's second opinion spinal surgery doctor in a report and response form, dated June 5, did not concur in the proposed procedure indicating that he believed additional testing was needed, commenting that he did not have all the diagnostic films and stating that he did not have Dr. D's "specific recommendations." Dr. L stated that if claimant were "to receive the Gadolinium enhanced MRI and the discogram and were in order" he would concur in Dr. D's recommended procedure.

Claimant's second opinion spinal surgery doctor was Dr. W who in a report and response form dated June 27, concurred in the recommended procedure stating:

> I think the removal of the hardware is important at this time. Therefore, I agree with removal of the hardware. I do not think that any further bony work is necessary at the present time with this problem. Therefore I agree with the impending surgery and recommend that removal of the hardware be done in his lumbar spine at the 3-4 level.

In a report dated June 23, Dr. D stated that he did not believe further diagnostic testing was necessary and that there was no reason to subject claimant to an invasive discogram of a normal disc.

By letter of July 5 the Commission advised the parties that one of the second opinion doctor's had agreed with the treating doctor's recommendation and that carrier had ten days to appeal that decision. The claimant underwent the hardware removal by Dr. D on July 12, the same day that carrier appealed the Commission's decision that two doctors's had concurred in spinal surgery and requested a CCH.

Section 408.026 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) govern a carrier's liability for spinal surgery. Specifically Rule 133.206(k)(4) provides that of the three recommendations and opinions (the surgeon's and the two second opinion doctor's), presumptive weight will be given to the two which had the same result, that 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 recommendations of the surgeon and the opinions of the two second opinion doctors.

Although carrier offers the opinion of another doctor, Rule 133.026 (k)(4) specifically provides that only the recommendations of the treating surgeon and the two second opinion doctors are to be considered. While it is unusual to have the surgery prior to the CCH we do not view that as a ground for relieving carrier of liability for the spinal surgery. Nor do we perceive error in that Dr. L did not have all the diagnostic tests or records in that Dr. L had already non-concurred and Dr. D, in his June 23 report, had explained why he did not want to do further invasive testing.

Accordingly the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge