APPEAL NO. 002049

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A spinal surgery contested case hearing (CCH) was held on August 16, 2000. The issue at the CCH was whether the appellant (carrier) was liable for the cost of spinal surgery. The hearing officer determined that the carrier was liable. The carrier appealed the hearing officer's determination.

DECISION

Affirmed.

The basic facts of this case are not in dispute. The claimant sustained a compensable spinal injury when she fell backward as she was attempting to enter a van used by her employer to ferry employees to the parking lot where their cars were located. On _____, Dr. M, recommended that the claimant undergo spinal surgery and executed a TWCC-63 (Recommendation for Spinal Surgery) which was then transmitted to the Texas Workers' Compensation Commission (Commission). Dr. M recommended a lumbar discectomy at L5-S1.

The carrier was notified that a TWCC-63 had been received and was provided with a list of second opinion doctors by the Commission. The carrier selected Dr. MC, as its second opinion doctor. Dr. MC examined the claimant on November 1, 1999. Dr. MC did not concur in the need for spinal surgery and so advised the Commission. In his narrative, Dr. MC stated that he was unable to account for the claimant's left leg pain based on an MRI scan findings or his physical examination of the claimant. Dr. MC stated that he was sure that the claimant had a component of diabetic peripheral neuropathy and probably some component of mechanical pain due to excessive weight. Dr. MC recommended that the claimant undergo a medically supervised weight loss program before any consideration for surgery. The Commission advised the claimant of the nonconcurrence.

The claimant selected Dr. C, as her second opinion doctor. Dr. C examined the claimant on November 16, 1999. He did not concur with the need for spinal surgery, stating that additional testing was needed and also stating that she should be enrolled in a medically supervised weight loss program. Dr. C notified the Commission of his nonconcurrence.

By letter dated November 30, 1999, the Commission notified the claimant that neither second opinion doctor had concurred with the need for spinal surgery or that one or both of the doctors had recommended more tests. In its notice to the claimant, the Commission stated:

> If one of the second-opinion doctors recommended more tests, those tests may show that surgery is necessary. If you have the tests, your surgeon

> should resubmit the recommendation for spinal surgery as described in Rule 133.206(l) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(l)].

Claimant underwent the discograms recommended by Dr. C, and on January 4, 2000, the claimant met with Dr. C and discussed the results of those tests. In a Spineline Fax Response dated January 4, 2000, Dr. C advised the Commission that he did not concur with the recommended procedure but would recommend a different type of spinal surgery. In particular, Dr. C's narrative report stated:

> With regards to the second opinion, I do not agree with the simple discectomy as initially proposed, but would agree to multi-level fusion and I asked Dr. M to fill out the appropriate paperwork and send this back to my office.

On January 6, 2000, Dr. M executed a progress report which stated that the claimant needed a three-level fusion and a discectomy at L5, which he believed to be the lowest level. On January 17, 2000, the claimant again saw Dr. MC. Dr. MC wrote a letter to Dr. P, the claimant's treating doctor, stating that he had discussed the results of the claimant's discograms with the claimant, that he did not believe that the discogram was a reliable diagnostic tool, and that he had advised the claimant that he would not operate on her under the circumstances unless she lost 50 to 80 pounds and was still symptomatic.

On April 11, 2000, Dr. M executed an "Ammended" [sic] recommendation for spinal surgery. In that documentation he recommended a "PLF L3-L4, L4-L5, L5-L6" and "instrumentation." In an area marked "TWCC USE ONLY," the amended form notes that the carrier's second opinion doctor's report was received on May 15, 2000, and that the claimant's second opinion doctor's report was received on January 8, 2000.

On June 6, 2000, the Commission sent notice to the claimant, with a copy to the carrier, advising the claimant that one of the second opinion doctors had concurred with her surgeon's recommendation for spinal surgery and that the carrier would be liable for the costs of spinal surgery unless it appealed. On June 12, 2000, the carrier filed its request for a CCH with the Commission's Central Office in Austin, identifying the issue as "Necessity of spinal surgery."

Prior to the hearing, the carrier requested permission to take Dr. C's deposition on written questions and permission was granted. At the hearing, the carrier moved for a continuance, asserting that although it had attempted to obtain Dr. C's deposition on written questions, Dr. C had failed and refused to answer the questions. The carrier also moved for the hearing officer to either advise Dr. C that he must submit to the deposition or appoint an alternate second opinion doctor. The hearing officer denied the motion for continuance and stated that he did not have the authority to compel Dr. C to submit to the deposition on written questions and that the carrier's relief for such failure was to file a motion to compel with a court of competent jurisdiction.

In its first point of error, the carrier asserts that the hearing officer erred in denying the motion for continuance and refusing to contact Dr. C to either obtain clarification or advise Dr. C of the need to submit to the deposition on written questions, or alternatively appointing an alternative second opinion doctor. The carrier argues that a second opinion doctor is akin to a designated doctor and that where a second opinion doctor fails or refuses to follow the law, an alternative doctor should be appointed. The carrier cites Texas Workers' Compensation Commission Appeal No. 991692, decided September 17, 1999, in support of its proposition. We note that in Texas Workers' Compensation Commission Appeal No. 950965, decided July 28, 1995, the Appeals Panel held:

> [H]ere we are not dealing with issues of credibility, but with interpreting a written document. This is analogous to the many cases where we have felt that ambiguity in the report of the designated doctor required that the hearing officer seek clarification from the designated doctor as part of the hearing officer's duty to fully develop the record. In fact, we have also spoken to the need to seek clarification in the context of spinal surgery second opinions. We stated in Texas Workers' Compensation Commission Appeal No. 950758, decided July 12, 1995, that "the existence of a dispute over the meaning of his report suggests that, were he a second opinion doctor, clarification of his position by the hearing officer would have been most appropriate." In Appeal No. 950758 we did not remand because we decided that case on other grounds.

While in certain circumstances clarification from a second opinion doctor is necessary, that necessity arises when the second opinion doctor's report is ambiguous. In the instant case, Dr. C clearly indicated that he believed that a stabilization procedure (the multi-level fusion) was appropriate, but disagreed with the proposed discectomy. In the absence of ambiguity, we do not find the hearing officer's refusal to seek clarification to be in error.

Nor do we find the hearing officer's failure to continue this matter to be in error. It is clear from the carrier's motion that it had sought the Commission's permission to obtain Dr. C's written deposition, had attempted to do so, but had met with little success and some resistance from Dr. C's staff. In a case where a deponent fails to comply with the Commission's subpoena, Rule 142.1 states that enforcement of subpoenas shall be governed by Section 2001.021 of the Government Code. Section 2001.021 states:

> **§ 2001.201. Court Enforcement of Subpoena or Commission**
>
> (a) If a person fails to comply with a subpoena or commission issued under this chapter, the state agency issuing the subpoena or commission, acting through the attorney general, or the party requesting the subpoena or commission may bring suit to enforce the subpoena or commission in a district court in Travis County or in the county in which a hearing conducted by the agency may be held.

(b) A court that determines that good cause exists for the issuance of a subpoena or commission shall order compliance with the subpoena or commission. The court may hold in contempt a person who does not obey the order.

The carrier obtained the hearing officer's permission to take the deposition on written questions on July 5, 2000. The order granting permission to take the deposition on written questions was sent to the carrier on July 6, 2000, and was then sent by the carrier to its agent for the service of the subpoena and was received by them on July 13, 2000. On July 17, 2000, the agent for the service of the subpoena confirmed that the deposition had been received in Dr. C's office. Beginning on July 17, 2000, and continuing through August 2, 2000, the agent for the service of process made a number of calls to Dr. C's office in an attempt to obtain the answers to the written question. On August 2, 2000, the agent for the service of the subpoena contacted the carrier and requested that the original, presumably the original subpoena for deposition on written questions, be sent to them by overnight courier in order to personally serve the subpoena on Dr. C. When the carrier's agent received the original subpoena, it was taken to Dr. C's office and simply left at the office when the person serving the subpoena was advised that Dr. C was not there.

In light of the foregoing, the hearing officer found that there was no good cause to continue the hearing. Whether good cause exists is a question of fact and a finding on that issue will be reversed only on a showing of an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 950115, decided March 3, 1995; Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. Applying the standard for review of an abuse of discretion in the cases cited, we conclude that the hearing officer did not abuse his discretion in denying the motion for continuance. We further find that the hearing officer did not abuse his discretion in denying the carrier's motion to disqualify Dr. C from acting as the claimant's second opinion doctor and refusing to order the selection of an alternate doctor. The carrier's first point of error is found to be without merit.

In its second point of error, the carrier asserts that the hearing officer erred in finding that ". . . spinal surgery is appropriate for the claimant at this time." While the foregoing conclusion of law may have been better stated, the following decision and order that the carrier is liable for the costs of spinal surgery flow from the hearing officer's findings that the claimant's surgeon, Dr. M, had recommended spinal surgery and Dr. C had concurred with the need for the proposed procedure. While it is true that in January, 2000, Dr. M had proposed a fusion with a discectomy at L5-S1, and Dr. C had indicated agreement with a fusion, but not a discectomy, Dr. M's amended request for spinal surgery, dated April 11, 2000, proposes a posterior lumbar fusion at L3-4, L4-5 and L5-6 with instrumentation. That amended recommendation for spinal surgery makes no mention of a discectomy.

Rule 133.206(a)(13) defines concurrence as:

> 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 simulators.

We do not find the fact that Dr. M's recommendation of April 11, 2000, came after Dr. C indicated that he would concur in the need for a fusion, but not a discectomy, to be dispositive. In Texas Workers' Compensation Commission Appeal No. 991257, decided July 19, 1999, we considered a similar fact situation and reversed and rendered the hearing officer's decision that the insurance company in that matter was not liable for the costs of spinal surgery. In this case, as in Appeal No. 991257, *supra*, a second opinion doctor has concurred in the procedure set forth in the surgeon's amended recommendation, creating a presumption that the carrier is liable for the costs of the spinal surgery.

The hearing officer found that Dr. C had recommended that the claimant ". . . have spinal surgery in accordance with the type of spinal surgery recommended by [Dr. P] and [Dr. M]." We find no error in the hearing officer's determination that Dr. C concurred with Dr. M's recommendation for a stabilizing procedure.

The carrier also urged that Dr. C did not concur with the need for spinal surgery because he had recommended a medically supervised weight loss program for the claimant. While in his report of November 16, 1999, Dr. C had recommended a weight loss program which he believed would make the claimant a better surgical candidate in the long run, he did not predicate his nonconcurrence at that time on the claimant's losing weight. In his report of January 4, 2000, Dr. C did not make his recommendation for a fusion contingent upon the claimant losing weight. Only Dr. MC indicated that he would refuse to consider the claimant as a surgical candidate until she lost 50 pounds or more.

Finding no reversible error in the record and adequate support for the hearing officer's findings of fact, we affirm the Decision and Order of the hearing officer that the carrier is liable for the costs of spinal surgery.

_____
Kenneth A. Huchton
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge