APPEAL NO. 002338

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 September 12, 2000. With regard to the only issue before her, the hearing officer determined that the appellant (carrier) is liable for the expenses of spinal surgery.

The carrier appeals, contending that "there is no true concurrence on the type of surgery required" or, in the alternative, that "its liability should be limited to surgical procedures identified in the TWCC-63 [Recommendation for Spinal Surgery] submitted on Claimant's [respondent] behalf." The carrier contends that the exclusion of the recommendation for a fusion and the failure to include Dr. C as an "assisting doctor" on the TWCC-63 relieves the carrier of liability for the procedure. The claimant responds that the carrier is relying on a technicality to relieve it of its obligation to pay for the procedure and urges affirmance.

DECISION

Affirmed.

This is a spinal surgery case. The parties stipulated that the claimant sustained a compensable low-back injury on _____. The claimant's treating doctor was Dr. GA, a chiropractor. The claimant did not testify and the case was submitted on the medical reports. Dr. GA treated the claimant with physical therapy and in June 1999, an MRI showed a left-sided disc herniation at L5-S1. Dr. GA referred the claimant to Dr. HA. The claimant apparently returned to work for a while until February 2000, when her condition worsened.

On a TWCC-63 dated March 13, 2000, Dr. HA recommended spinal surgery in the form of a lumbar laminotomy, discectomy at L5-S1 and foraminotomy (the TWCC-63 actually spells it "formanenotomy"). A narrative dated March 10, 2000, explains in more detail what Dr. HA intended to do. The claimant had another MRI performed on March 30, 2000, and in a report dated April 10, 2000, Dr. HA commented:

> The MRI showed severe worsening of the previous herniated disk at the L5-S1 level. Now there is almost a complete block of the spinal canal and there is an extruded fragment that has migrated below the disk level.
>
> [The claimant] needs an immediate lumbar laminectomy, and because of the severe degeneration of the disks, . . . in my opinion, the patient needs to have a lateral fusion of that space so that we can assure that no further problems will come from that disk.

The carrier's spinal surgery second-opinion doctor was Dr. H, who in a report dated May 22, 2000, agreed that surgery was indicated but did not "see any reason to do the

fusion." Dr. H, in his report, states that he sent his report to Dr. HA and the Texas Workers' Compensation Commission (Commission). On a Commission form Dr. H marked "Yes, surgery is indicated but I recommend a different procedure."

In a letter dated June 22, 2000, the Commission wrote the parties and Dr. HA that the carrier's second-opinion doctor agreed with Dr. HA's recommendation for spinal surgery and that that letter was "your preauthorization for spinal surgery."

Meanwhile, the claimant's second-opinion doctor was Dr. M, who in a report dated July 20, 2000, commented that "[w]e all agree that [the claimant] needs an operation, but the question is the extent of the operation." Dr. M goes on to state:

> I tend to agree with [Dr. HA] that she would be better off with a bilateral disk removal and lateral fusion because of the nature of her disk problem and painful symptoms. I would be very concerned that without a fusion, she would continue to have quite a bit of incapacitating back pain, which would prevent her from being able to return to work and may necessitate further surgery.

Subsequently, the Commission in a letter dated August 1, 2000, sent to the parties and Dr. HA, stated that one of the second-opinion doctors agreed with Dr. HA's recommendation for spinal surgery "creating a two-to-one decision in favor of spinal surgery" and that the carrier had 10 days to appeal that decision. The carrier requested a CCH, apparently on August 7, 2000. It is unclear but apparently neither the claimant nor Dr. HA received the carrier's appeal and proceeded with the proposed spinal surgery on August 22, 2000, and this proceeding was subsequently held on September 12, 2000.

The hearing officer considered the evidence and in her Statement of the Evidence commented that to find that the carrier was not liable for the spinal surgery "would be to elevate form way above substance." The hearing officer went on to comment:

> Regardless of its absence in the TWCC-63 form, the evidence firmly establishes that the fusion was recommended by [Dr. HA] in a narrative report that was furnished not only to the Carrier, but also to both second opinion doctors by the time they each examined the Claimant. Therefore, the fusion procedure became a part of the recommendation for surgery, and it was considered by [Drs. H and M]. [Dr. H] concurred with the need for all the recommended procedures except the fusion; [Dr. M] agreed with the entire recommendation. For these reasons, it is determined that the Carrier is liable for the Claimant's August 22, 2000 surgery.

The carrier contends that the exclusion of the recommendation for the fusion (and the failure to identify Dr. C as an assisting doctor) relieves it of liability for the spinal surgery or, in the alternative, that it is liable only for the surgery listed on the TWCC-63 and not for the fusion.

Section 408.026 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (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 nonconcurrence 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, and 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 recommendation of the surgeon and the opinions of the two second-opinion doctors.

While it is regrettable that Dr. HA failed to amend his TWCC-63, as noted by the hearing officer, both the second-opinion doctors were clearly aware that Dr. HA's recommendation included a fusion. The reports of the doctors, as well as the Commission's June 22, 2000, letter were sent to the carrier with apparently no objection by the carrier until August 7, 2000, after it received the Commission's August 1, 2000, letter. In any event, presumptive weight is given to the reports of the two doctors who agreed to the same result, in this case Dr. HA and Dr. M. Rather clearly, all the doctors based their opinions regarding the proposed procedure on the narrative rather than the abbreviated TWCC-63. We agree with the rationale expressed by the hearing officer and find nothing to indicate that it is incorrect as a matter of law.

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

Thomas A. Knapp
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Robert W. Potts
Appeals Judge