APPEAL NO. 002877

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 13, 2000, a spinal surgery contested case hearing (CCH) was held, with the record closing on November 28, 2000. The hearing officer resolved the disputed issue by deciding that the respondent (carrier) is not liable for the recommended spinal surgery. The appellant (claimant) appealed and the carrier responded.

DECISION

Reversed and remanded.

The claimant sustained a compensable back injury on_____. In a Recommendation for Spinal Surgery (TWCC-63) Dr. B, the claimant's treating doctor, listed himself as the treating doctor and as the surgeon, and recommended lumbar spinal surgery (laminectomies). Dr. T, the carrier's second opinion doctor, did not concur with Dr. B's recommendation for surgery and his amended report reflects that he reviewed the myelogram and CT scan. Dr. L, the claimant's second opinion doctor, concurred with the recommended surgery but noted that the myelogram was not available for his review and did not mention the CT scan that was done the same day as the myelogram.

The parties agreed at the CCH that the hearing officer would hold the record open to obtain a report from Dr. L regarding his review of the myelogram and CT scan and whether those studies changed his opinion. The hearing officer held the record open and wrote to Dr. L stating that the claimant would provide him with the myelogram and CT scan and requesting a response. The hearing officer made several other contacts with Dr. L's office to get a response. When the hearing officer had not received a response from Dr. L by November 28, 2000, the hearing officer closed the record and issued a decision in which she deemed Dr. L's opinion a nonconcurrence for failure to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(i)(2) (Rule 133.206(i)(2)), found that Dr. T had issued a nonconcurrence, gave presumptive weight to the two opinions "which had the same result," and found that the great weight of the medical evidence is against the recommended spinal surgery.

The hearing officer erred in deeming Dr. L's opinion a nonconcurrence for failure to comply with Rule 133.206(i)(2). Rule 133.206(e)(3) provides that the surgeon shall ensure that all medical records and films arrive at each second opinion doctor's office prior to the date of the scheduled second opinion. Rule 133.206(i)(2) provides that the second opinion doctor's opinion must be based on physical examination of the injured employee and review of the medical records and films forwarded by the surgeon. There is no indication in the CCH record that Dr. B, the surgeon, had sent the myelogram and CT scan to Dr. L and thus it cannot be said that Dr. L failed to comply with Rule 133.206(i)(2).

However, since it is apparent that the parties did want Dr. L to review the myelogram and CT scan, we believe the best course of action in this case is to remand the case to the hearing officer for the hearing officer to have Dr. B send the myelogram and CT scan to Dr. L for review and for Dr. L to provide a report on spinal surgery that considers those studies and gives his opinion. If Dr. L has already reviewed the myelogram and CT scan and given his opinion, which, according to a letter sent to us by the claimant, is probably the case, then it may not be necessary for the hearing officer to contact Drs. B and L. We reverse the hearing officer's decision that the carrier is not liable for spinal surgery and we remand the case to the hearing officer for further consideration and development of the evidence regarding Dr. L's opinion on spinal surgery taking into consideration the myelogram and CT scan and for further findings of fact and conclusions of law consistent with the requirements of Rule 133.206.

The hearing officer's Decision and Order is reversed and remanded. 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 new request for review not later than 15 days after the date on which the 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:

Robert E. Lang
Appeals Panel
Manager/Judge

Thomas A. Knapp
Appeals Judge