APPEAL NO. 010762

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 March 26, 2001. The hearing officer determined that the appellant (carrier) is liable for the cost of spinal surgery for the respondent (claimant). The carrier urges on appeal that this determination is against the great weight of the evidence, and that although maximum medical improvement (MMI) and impairment rating (IR) were not issues presented at the CCH for resolution, requests that a new decision be rendered finding that the claimant reached MMI on May 6, 1998, with an 11% IR. The claimant urges affirmance.

DECISION

Affirmed.

Section 408.026(a), regarding spinal surgery second opinion, provides that, except in a medical emergency, an insurance carrier is liable for medical costs related to spinal surgery only if: (1) before surgery, the employee obtains from a doctor approved by the insurance carrier or the Texas Workers' Compensation Commission (Commission) a second opinion that concurs with the treating doctor's recommendation; (2) the insurance carrier waives the right to an examination or fails to request an examination before the 15th day after the notification that surgery is recommended; or (3) the Commission determines that extenuating circumstances exist and orders payment for surgery.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206), regarding spinal surgery second opinion process, was amended effective June 30, 1998, and the amended rule is effective for all Recommendation for Spinal Surgery (TWCC-63) forms filed with the Commission on or after July 1, 1998. Rule 133.206, as amended, defines "concurrence" in subsection (a)(13) as a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed, states 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, and describes types of spinal surgery. Prior to amendment, Rule 133.206(a)(13) defined "concurrence" as a second opinion doctor's agreement with the surgeon's recommendation that spinal surgery is needed, stated that that need is assessed by determining if there are any pathologies in the spine that require surgical intervention, and further stated that any indication by the qualified doctor that surgery to the proposed spinal area is needed is considered a concurrence, regardless of the type of procedure or level. Rule 133.206, as amended, defines "nonconcurrence" in subsection (a)(14) as a second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed. Prior to amendment, Rule 133.206(a)(14) defined "nonconcurrence" as a second opinion doctor's disagreement with the surgeon's recommendation that spinal surgery is needed. Rule 133.206(k)(4) continues to provide 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, they will be upheld

unless the great weight of medical evidence is to the contrary, and the only opinions admissible at the hearing are the recommendations of the surgeon and the opinions of the two second opinion doctors.

The claimant sustained a compensable injury to his back in _____. Three surgeries were performed between 1995 and 1997. On December 5, 2000, Dr. J, the claimant's surgeon, recommended further surgery, which is the subject of these proceedings. Dr. J recommended a "decompression of the L5-S1 region, posterior interbody fusion, posterior lateral fusion, steffer instrumentation, Brantigua interbody fusion cage and harvest bone graft." Dr. L, the carrier's second opinion doctor, did not agree that surgery was indicated for the claimant and issued a nonconcurrence. Dr. K, the claimant's second opinion doctor, checked the block on a form supplied by the Commission which read: "YES, I concur that surgery is indicated for this patient." The form itself did not describe the surgical procedures in which Dr. K indicated concurrence. In an accompanying report, Dr. K wrote:

> [Claimant's] L5-S1 disc is clearly abnormal. He is requiring significant narcotic medication. I think it is a reasonable thing to offer him a fusion at the L5-S1 level, explore his L4-5 level, and supplement that fusion as necessary and see if this gives him some benefit and gets him off some of his pain medication.

The question for resolution was whether Dr. K's comments constitute a concurrence within the definition contained in Rule 133.206(a)(13). The hearing officer found that Dr. K concurred with Dr. J's recommendation for spinal surgery. He explained that he construed Dr. K's comments as intended to emphasize the need for a fusion, but in no way to exclude the decompression or to qualify his "Yes" on the spineline form. Dr. K's report indicates that he agrees that surgery is warranted. Given that Dr. K indicated on the spineline form that he was in agreement with the type of surgery recommended by Dr. J, the fact that he did not specifically address decompression in his report would not render his opinion a nonconcurrence. As a result, we cannot agree with the carrier's assertion that the hearing officer erred in determining that Dr. K's report was a concurrence within the meaning of Rule 133.206(a)(13).

As noted above, pursuant to Rule 133.206(k)(4), presumptive weight is given to the two opinions that reach the same result, unless the great weight of the other medical evidence is to the contrary. The hearing officer determined that the great weight of the other medical evidence was not contrary to the opinions of Dr. J and Dr. K that the proposed type of surgery was indicated; thus, he determined that surgery should be approved. Our review of the record does not demonstrate that the hearing officer's decision in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In the carrier's second point of error, it asserts that because the claimant's treating doctor did not recommend surgery, or refer the claimant to Dr. J, the claimant "is not entitled to such." We find no evidence in the record to suggest that this issue was raised by the carrier at the CCH and will not consider an issue raised for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991.

The carrier's final point of error on appeal is that because it disputed the extent of the compensable injury in a separate proceeding and because that dispute has not been resolved, the claimant should not have spinal surgery. There was indication that the extent of injury had been to a benefit review conference. The carrier argues that because it has accepted compensability for an injury to the L4-5 level only, the hearing officer erred in approving the recommended surgery to the disputed L5-S1 level. The record reflects that when the extent of injury issue was raised at the CCH, the hearing officer offered the parties an opportunity to add the issue for consideration, but the parties declined. The case is thus distinguishable from the situation compelling remand in Texas Workers' Compensation Commission Appeal No. 970978, decided July 7, 1998. Although we do not agree that the pending dispute involving extent of injury requires reversal in this case, we note that the decision and order depends somewhat on the outcome of the dispute over the extent of injury, so long as that dispute is actively and promptly pursued in the Commission.

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge