APPEAL NO. 010922

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 3, 2001. On the sole issue, the hearing officer determined that spinal surgery is not appropriate for the appellant (claimant) at this time and the respondent (carrier) is not liable for the expenses of spinal surgery. The claimant appealed the hearing officer's determination on sufficiency grounds. The carrier urges affirmance.

DECISION

Reversed and remanded.

The hearing officer erred in determining that spinal surgery is not appropriate for the claimant. Section 408.026(a)(1), 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 before surgery, the employee obtains from a doctor approved by the carrier or the Texas Workers' Compensation Commission (Commission) a second opinion that concurs with the treating doctor's recommendation. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) defines "concurrence" 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 as including stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators. Rule 133.206(a)(14) defines "nonconcurrence" as 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.

On _____, while removing a door from its hinges at his employment, the claimant experienced pain in his low back radiating to his legs. The claimant subsequently underwent a laminectomy at L5-S1 on July 15, 1999. Following his surgery, the claimant continued to experience pain in his lower back and was referred to Dr. B at the (Institute) for further treatment. Dr. B diagnosed the claimant with post laminectomy syndrome with discogenic pain at L5-S1. He also recommended further surgery, which is the subject of these proceedings. Dr. B recommended that the claimant "is a candidate for intervertebral disc intervention. We will have him go through informed consent for the SB3 protocol." Dr. W, the carrier's second opinion doctor, understanding Dr. B to have recommended an anterior lumbar fusion at L5-S1, recommended that the claimant either have no surgery and be managed as a pain problem or undergo a three-level discectomy and fusion. Dr. M, 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 with which Dr. M indicated concurrence. In a report intended to accompany the form, Dr. M wrote:

> I feel that while the patient may benefit from a discectomy and fusion at L5-S1. He also appears to clearly have pathology at L4-5, and I feel that whatever procedure is done should be done at two-levels rather than one. The patient, in fact, notes to me that he has been told by [Dr. B] that he is a candidate for a fusion at one-level and an artificial disc at another level. If, indeed, this is of consideration while he is aware that the artificial disc is purely on an experimental basis, this may be a consideration depending on the specific indications for artificial discs. I would, however, recommend that at least some attention be paid to the L4-5 in addition to L5-S1.
>
> Personally, I would recommend a fusion at L4-5 as well as L5-S1. If the patient, however, fits into experimental protocols and [Dr. B] thinks that it is more appropriately [sic] to attempt an artificial disc at one or both levels, I feel that this would be a reasonable option as long as the patient is well aware of potential risks and complications and experimental protocols of this.

In response to the recommendations of the second opinion doctors, Dr. B wrote:

> Limiting spinal fusion to a single level will markedly increase the success rate of this particular surgery. Of note, this gentleman had a discectomy at this level so in addition to discogenic pain syndrome he has post laminectomy syndrome as well.
>
> In summary, we have basically three opinions that this patient is a surgical candidate for spinal fusion and it is my opinion that the patient would best be served by a single level rather than a three level fusion for the reasons as outlined above.

The hearing officer found that Dr. M recommended that the claimant not have spinal surgery in accordance with the type of spinal surgery recommended by Dr. B. Finding of Fact No. 7. In the discussion portion of the decision, the hearing officer stated, "In short, it appears that [Dr. B] is recommending surgery at one level, L5-S1 . . . and that [Dr. M] is recommending a two level fusion at L4-5 and L5-S1." The claimant appealed the determination that there was no concurrence, arguing that Dr. M's recommendation is a concurrence with the type of surgery recommended by Dr. B.

Recent Appeals Panel decisions under the latest version of Rule 133.206 resulted in a reversal and remand for further clarification of the second opinions. *See* Texas Workers' Compensation Commission Appeal No. 991255, decided July 19, 1999; Texas Workers' Compensation Commission Appeal No. 990547, decided April 29, 1999; and Texas Workers' Compensation Commission Appeal No. 990059, decided February 19,

1999. Each case stressed that under the latest version of the rule, there had to be a concurrence in the proposed type of surgery, not merely an indication that surgery was needed. In the case we now consider, we cannot conclude, in the absence of a clear description of the procedures recommended by Dr. B, that Dr. M's recommendation did not constitute a concurrence with Dr. B's proposal. For this reason, and to avoid any misunderstanding of what Dr. M is concurring in, we reverse the determination of the hearing officer which found that the carrier was not liable for spinal surgery and remand for further inquiry of Dr. B and the second opinion doctors, to determine what types of surgery are recommended and whether there is a concurrence with each type of surgery recommended. In his decision and order on remand, the hearing officer should make specific findings with regard to what types of surgery are recommended by Dr. B and whether Dr. W and Dr. M agreed with each type of surgery recommended by Dr. B.

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 request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Michael B. McShane
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Susan M. Kelley
Appeals Judge